No. 88-42-CFX
Status: GRANTED

Title: Olaf A. Hallstrom, et ux., Petitioners
v.
Tillamook County

Docketed:
July 6, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Buckley,Kim T.

Counsel for respondent: Hunsacker III,I. Franklin

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1988	G	Petition for writ of certiorari filed.
2	Aug 5 1988		Brief of respondent Tillamook County in opposition filed.
3	Aug 10 1988		DISTRIBUTED. September 26, 1988
4	Sep 21 1988	X	Reply brief of petitioners Olaf Hallstrom, et ux. filed.
5	Oct 3 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Feb 17 1989		Brief amicus curiae of United States filed.
7	Feb 22 1989		REDISTRIBUTED. March 17, 1989
8	Mar 20 1989		Petition GRANTED.
			**********
9	May 4 1989		Joint appendix filed.
10	May 4 1989		Brief of petitioners Olaf Hallstrom, et ux. filed.
11	May 4 1989		Brief amici curiae of Sierra Club, et al. filed.
13	May 25 1989		Order extending time to file brief of respondent on the merits until June 22, 1989.
14	May 30 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Jun 12 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
16	Jun 13 1989		Record filed.
		*	Certified copy of original record and proceedings, Volumes 1 - 14 received. (Box).
17	Jun 22 1989		Brief amicus curiae of United States filed.
18	Jun 22 1989		Brief of respondent Tillamook County filed.
19	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 4, 1989. (2ND CASE)
20	Jul 21 1989		Reply brief of petitioners Olaf Hallstrom, et ux. filed.
21	Jul 27 1989		CIRCULATED.
22	Oct 4 1989		ARGUED.

88-42

No.

In the Supreme Court of the United States

October Term, 1987

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM, 1987

OLAF A. HALLSTROM AND
MARY E. HALLSTROM, Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Olaf A. and Mary E. Hallstrom petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-8a) is reported at 831 F.2d 889 (1987). The amended opinion of the court of appeals (App. B, infra, 9a-17a) is reported at 844 F.2d 598 (1988). The opinion of the trial court (App. C, infra, 18a-19a) on the question presented is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a-8a) was entered on November 3, 1987. A timely petition for rehearing was denied and an amended judgment (App. B, infra, 9a-17a) was entered on April 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

Section 7002 (b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (b) (1982 ed., Supp III), provides:

(b) Actions prohibited

(1) No action may be commenced under subsection (a) (1) (A) of this section -

(A) prior to 60 days after the plaintiff has given notice of the violation to -

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, or order

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter [Hazardous Waste Management]; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance

with such permit, standard, regulation, condition, requirement, prohibition, or order. In any action under subsection (a) (1) (A) of this section in a court of the United States, any person may intervene as a matter of right.

EPA Regulations on Prior Notice of Citizen Suits [under RCRA], 40 C.F.R. § 254 (1988) are set forth in App. D, infra, 20a-23a.

The following statutes contain identical or substantially similar 60-day notice provisions for citizen suits:

1. Section 505(b) of the Clean Water Act, 86 Stat. 816, 33 U.S.C. § 1365(b) (1982 ed.).
2. Section 304(b) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 7604(b) (1982 ed.).
3. Section 105 (g) (2) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415 (g) (2) (1982 ed.).
4. Section 12(b) of the Noise Control Act of 1972, 86 Stat. 1243, 42 U.S.C. § 4911(b) (1982 ed.).
5. Section 16(b) of the Deepwater Port Act of 1974, 88 Stat. 2141, 33 U.S.C. § 1515(b) (1982 ed.).
6. Section 1449(b) of the Safe Drinking Water Act, 88 Stat. 1690, 42 U.S.C. § 300j-8(b) (1982 ed.).
7. Section 520(b) of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U.S.C. § 1270(b) (1982 ed.).
8. Section 20(b) of the Toxic Substance Control Act, 90 Stat. 2041, 15 U.S.C. § 2619(b)(1982 ed.).

STATEMENT OF THE CASE

Petitioners invoked the jurisdiction of the district court under § 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 ("RCRA"), and under 28 U.S.C. § 1331 (federal question).

Petitioners own and reside on a dairy farm located next to the Tillamook County Landfill. Petitioners filed this action to compel respondent Tillamook County to operate its landfill in compliance with the standards and requirements established under RCRA. Petitioners also sought damages from respondent arising from state claims for inverse condemnation, trespass, and nuisance.

On April 20, 1981, petitioners mailed formal notice of their intention to sue respondent Tillamook County to compel compliance with RCRA. Petitioners did not send a copy of this formal notice to the Administrator of the Environmental Protection Agency or Oregon's Department of Environmental Quality ("DEQ"). Excerpt at 17.

On April 9, 1982, petitioners filed the complaint in this case. Petitioners did not name the Administrator or DEQ as parties defendant. *Id.*

On March 1, 1983, respondent filed a motion for summary judgment asking the trial court to dismiss the case because 60 days' advance notice had not been given to the EPA or DEQ. Excerpt at 301; NR. 15.

The next day, on March 2, 1983, petitioners sent a copy of their original notice to respondent to the EPA and DEQ. Excerpt at 17. At the same time, petitioners notified the EPA and DEQ of their intention to refile the citizen's suit if the trial court dismissed the case. ERX. at 61-67.

On April 2, 1983, nine (9) days before the 60-day notice period would have expired, the trial court held that dismissal for failure to give notice to the EPA and DEQ "would be a waste of judicial resources." ERX. at 82. The trial court said in its opinion:

> Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

Id.

Trial began more than two years later on July 23, 1985, and was completed on July 26, 1985. Excerpt at 156. The trial court found that respondent had violated and would continue to violate RCRA, and it ordered respondent to propose a plan that would completely and permanently on July 23, 1985, and was completed on July 26, 1985. Excerpt at 156. The trial court found that respondent had violated and would continue to violate RCRA, and it ordered respondent to propose a plan that would completely and permanently contain leachate generated by the landfill within the landfill boundaries. Excerpt at 155-166. The state claims were tried to a jury, which found for respondent on all three claims.

After the final judgment was entered, petitioners moved for an award of $42,000 in attorney fees and $53,000 in expert witness fees. Excerpt at 181-190. The trial court denied petitioners' motion even though respondent was found to be in violation of RCRA. Excerpt at 228-236.

Petitioners filed a timely notice of appeal to the Ninth Circuit and requested review of the trial court's injunctive relief, the denial of petitioners' motion for attorney and expert witness fee, and certain key evidentiary rulings. Respondent cross-appealed on the 60-day notice question now before the Court.

The Ninth Circuit limited its review to the 60-day notice issue raised by respondent's Tillamook County's cross-appeal. The Ninth Circuit observed that the majority of the seven circuits that had considered the issue had held that 60 days' notice is a procedural, not a jurisdictional, prerequisite for environmental citizen suits. The

difference between the two interpretations is that if the notice provision is procedural, a failure to give notice may be cured by a 60-day stay. If jurisdictional, the case must be dismissed and then refiled after 60 days.

In its opinion, the Ninth Circuit discussed the "pragmatic approach" adopted by the Second, Third, Eighth, and District of Columbia Circuits, and observed that that interpretation underscores the importance of citizen enforcement of federal environmental policies.

The Ninth Circuit decided, however, to adopt the "jurisdictional prerequisite approach" of the First, Sixth, and Seventh Circuits. The Ninth Circuit reasoned that the jurisdictional approach finds support in the plain language of the statute and a perceived policy of allowing the EPA and the State to avoid litigation by investigating and correcting the violation through non-judicial means. The Ninth Circuit said that non-judicial resolution of environmental disputes was more likely in a non-adversarial setting before suit is filed.

Circuit Judge Pregerson dissented. He said that the goal of agency enforcement is served by a 60-day stay of district court proceedings. If the agency has taken no action after 60 days, it would be excessively formalistic to require the district court to dismiss the case and the parties to refile.

Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing en banc. The Ninth Circuit amended its opinion to clarify the effect of its decision on the pendent state claims. The Ninth Circuit held that because the trial court lacked subject matter jurisdiction over the RCRA claim, it also lacked pendent jurisdiction over the pendent state claims.

REASONS FOR GRANTING THE PETITION

1. *The Ninth Circuit's Decision Directly Conflicts With Decisions Of The Second, Third, Eighth, And District Of Columbia Circuits.*

At least eight other environmental statutes contain notice provisions that are identical or similar to that contained in RCRA. As noted in the Ninth Circuit's opinion, courts have interpreted these provisions identically despite slight differences in wording. *Hallstrom V. Tillamook County*, 844 F . 2d 598, 600 (9th Cir. 1987).

The pragmatic approach, used by the Second, Third, Eighth, and District of Columbia Circuits, interprets the notice requirement in federal environmental statutes as procedural, not jurisdictional. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3rd Cir. 1980), cert. denied, 449 U.S. 1096 (1981); *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974). Under the pragmatic approach, a plaintiff's failure to give formal notice to the Administrator and the State before filing a citizen's suit against the alleged violator may be cured by a stay of proceedings for 60 days. A stay gives the EPA or the State enough time to file a n enforcement proceeding in court to compel compliance, thus obviating the need for the citizen suit.

Instead of interpreting the notice provision pragmatically, the Ninth Circuit adopted the jurisdictional prerequisite approach used by the First, Sixth, and Seventh circuits. *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 78 (1st Cir. 1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th

Cir. 1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976). Under the jurisdictional prerequisite approach, if a plaintiff does not give 60 days' notice to the Administrator, the State, and the alleged violator, the case must be dismissed and the plaintiff would be required to refile 60 days after formal notice was given to the Administrator and the State.

The resolution of the 4-4 split among the circuits is the only question presented to this Court. If this Court adopts the pragmatic approach and interprets the 60-day notice provision to be procedural, then the injunction requiring respondent Tillamook County to comply with RCRA will be reinstated. In addition, the Ninth Circuit can then direct its attention to the other issues that petitioners raised on appeal, including the trial court's denial of an award of $95,000 to reimburse petitioners for attorney and expert witness fees they paid in connection with this case.

2. *The Ninth Circuit Decided An Important Question Of Federal Law In A Way In Conflict With A Decision Of This Court.*

The Ninth Circuit's rationale for adopting the jurisdictional prerequisite approach is in conflict with this Court's discussion of a nearly identical notice provision in the Clean Water Act, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (1983 ed. and Supp. III). *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, ____ U.S. ____, 108 S. Ct. 376 (1987).

The Ninth Circuit reasoned that the jurisdictional prerequisite approach should be adopted because (a) citizen's suits burden federal courts, (b) citizen's suits somehow burden the EPA, and (c) the 60-day period allows the EPA and the State to avoid litigation in court:

> This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against *the burdens that such enforcement places on the EPA and the federal courts.* By notifying the EPA and the State of potential legal action, the citizen plaintiff allows them *to avoid litigation by investigating and correcting the alleged violation through non-judicial means.*

Hallstrom v. *Tillamook County*, 844 F.2d at 600 (9th Cir. 1987) (emphasis added).

In contrast, this Court wrote in *Gwaltney* that the 60-day period gives the EPA and the State time to file their own enforcement actions in either federal or state court and the violator time to come into complete compliance. This Court did not in any way suggest that the purpose of the 60-day notice provision was to encourage non-judicial resolution of environmental disputes or to relieve any perceived burden that citizen suits place on the federal courts or the EPA. This Court said:

> Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation "occurs."
>
> * * *
>
> Any other conclusion [*i.e.*, that the violation sought to be addressed cannot be wholly in the past] would render incomprehensible § 505's notice provision, which requires citizens to give 60 days notice of their intent to sue the alleged violator as well as to the Administrator and the State. If the Administrator or State commences enforcement action within that 60 day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an

opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Gwaltney, supra, 108 S.Ct. at 382-83 (citations omitted).

As this Court observed in *Gwaltney*, the only kind of EPA or State Action that can stop a citizen suit is a civil enforcement proceeding filed *in court*. Thus, the Ninth Circuit's concern that a pragmatic interpretation of the 60-day notice provision would not encourage non-judicial resolution misses the point. The statutory framework for RCRA and the other similar environmental statutes assumes that the only kind of non-judicial resolution of the conflict is if the violator brings itself into complete compliance with the statute within 60 days. Otherwise, the violator will face court action either by governmental authorities or by citizens acting as private attorneys general.

Here, of course, the alleged violator was given 60 days' notice before the action was commenced, and the Administrator and the State chose not to file an enforcement action in court within 60 days after they received formal written notice of the pendency of the suit.

Had the Administrator or the State filed an enforcement action in court, dismissal of petitioners' case would have been appropriate. The purpose of the notice provision would have been served, and petitioners then could have intervened as a matter of right. 42 U.S.C. § 6972 (b).

3. *The Question Presented Is Addressed To This Court's Supervisory Power.*

This Court has final responsibility for the proper functioning of the federal judiciary. Accordingly, cases involving the jurisdiction of of the federal courts are appropriate for this Court's consideration. For example, in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), this

Court considered the jurisdictional amount in class actions.

The question presented involves the subject matter jurisdiction of the federal district courts over citizen suits brought to enforce at least nine federal environmental statutes. Exercise of this Court's power of supervision will serve "the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965).

4. *The Question Presented Is Important Because It Involves The Citizen Suit Provisions Of Nine (9) Federal Environment Statutes.*

As noted above, at least nine (9) environmental statutes contain 60-day notice provision identical or substantially similar to that contained in RCRA. All of these notice provisions relate to the role and right of citizens, acting as private attorneys general, to enforce federal environmental policies. Thus, the question presented does not affect only the parties in this case or citizen enforcement of RCRA. The question presented also involves citizen enforcement of the Clean Water Act, the Clean Air Act, the Marine Protection, Research, and Sanctuaries Act of 1972, the Noise Control Act of 1972, the Deepwater Port Act of 1974, the Safe Drinking Water Act, the Surface Mining Control and Reclamation Act of 1977, and the Toxic Substance Control Act.

As noted above, the question presented is the subject of a 4-4 split among the circuits. Indeed, the Ninth Circuit panel that decided this case was split. Two members of the panel adopted the approach of a minority of the circuits, and one member would have adopted the approach of the trial court and the majority of the circuits.

As a result of the Ninth Circuit's decision, a successful citizen suit to enforce RCRA was defeated, and the legislative purpose of encouraging citizen suits to

supplement the limited resources of the EPA and the State was frustrated.

5. *The Ninth Circuit's Decision Is Error Because It Elevates Form Over Substance And Defeats The Purpose Of RCRA Of Encouraging Citizen Enforcement.*

The question presented is one of statutory interpretation. As Justice Stevens noted in his dissenting opinion in *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), the question presented is how the legislature intended the statute to apply to this case:

> In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it had chosen.[1]
>
> 1. "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. ... This is not the substitution of the will of the judge for that of the legislator, for frequently used words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892).

458 U.S. at 577.

Chief Justice Burger said the same thing in *Bob Jones University v. United States*, 461 U.S. 574 (1983):

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.

461 U.S. at 486.

The primary purpose of the citizen suit provisions of RCRA and the other environmental statutes is to protect the environment by citizen suits when the appropriate regulatory agencies lack the human and financial resources to act. In *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), the court, in discussing the Clean Air Act, said:

> In enacting 304 of the 1970 amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.

535 F.2d at 172.

The subsidiary purpose of the citizen suit provisions is to give the violator time to come into complete compliance and the governmental agencies time to control the course of environmental litigation if they file an enforcement action in court in 60 days. *See Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208-09 (4th Cir. 1985) (60-day waiting period gives government opportunity to control course of litigation if it acts within 60 days).

The Ninth Circuit wrote that unless the 60-day notice was interpreted to be jurisdictional, a suit could be filed which would automatically result in positions becoming hardened and relations becoming adversarial so that cooperation and compromise would be less likely. The Ninth Circuit reasoned that an adjustment of the trial date would never restore a 60-day nonadversarial period to the parties. *Hallstrom, supra*, 844 F.2d at 601.

Here, petitioners were never adversaries to DEQ or EPA. Indeed, as noted in Judge Pregerson's dissent, the EPA was content to let the Hallstroms use the citizen suit provision of RCRA to compel compliance. *Id.* at 602.

Furthermore, to require dismissal with refiling after 60 days is not going to soften positions of the actual adversaries. Respondent was given formal notice a full year before this action was filed. During that year, respondent made no improvements to the site and continued to discharge leachate onto petitioners' farm. RT (7/23/85) at 44.

The Ninth Circuit also reasoned that a jurisdictional interpretation to the 60-day notice provision would prevent legal fees from being incurred. 844 F.2d at 601. As noted above, petitioners have spent over $95,000 for attorneys and expert witnesses to compel compliance with RCRA. The trial court found that respondent had in fact violated RCRA since 1981 and would continue to do so. Surely, Congress did not intend the efforts of citizens like petitioners to go uncompensated merely because the EPA and DEQ were not notified until after this case began.

A procedural or pragmatic interpretation serves both the primary and subsidiary purposes of RCRA and the other environmental statutes. There is nothing magic in the filing of a lawsuit that prevents regulatory agencies from filing their own enforcement actions. Thus, a 60-day stay would serve the purpose of the 60-day notice requirement

without disserving the primary purpose of encouraging citizen suits to protect the environment.

Finally, as the court noted in *Susquehanna Valley, supra*, 619 F.2d at 243, "[R]eading [the 60-day advance notice pro-visions of the Clean Water Act] to require dismissal and refiling of premature suits would be excessively forma-listic."

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If the 60-day notice requirement is procedural rather than jurisdictional, this case should be remanded to the ninth Circuit for consideration of the other issues raised on petitioners' appeal.

Respectfully submitted,

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July 6, 1988

APPENDIX

APPENDIX A

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,
v.
TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.
Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ)

before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901 *et seq*. Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

42 U.S.C. § 6972(b)(1) provides:

> No action may be commenced under ... this section ... prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] ...

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island* 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824

(1981). Courts have construed these provisions identically despite slight differences in wording *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700 (D.C.Cir.1974).

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpretations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Counc-il v. Callaway*, F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance*, 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.*,700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council*, 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting

violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton*, 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia*, 761 F.2d at 78. *See also Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir.1975), *cert. denied*, 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia*, 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will.... [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33, 104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction.

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded for dismissal.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to The EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 7002 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced ... under this section ... prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged

violator...." We must decide whether this requirement acts to deprive a district court of jurisdiction over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held that the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir.1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act): *Natural Resources Defense Council V. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 891. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the

agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance*, 619 F.2d at 243.

APPENDIX B

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,

v.

TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.

Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

As Amended on Denial of Rehearing and
Rehearing En Banc April 7, 1988.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

ORDER

The panel voted unanimously to deny the petition for rehearing. The majority of the panel voted to reject the suggestion for rehearing en banc. Judge Pregerson was in favor of granting the suggestion for rehearing en banc.

A call for an en banc vote was made and the case failed to receive a majority of the votes of the active circuit judges in favor of rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

AMENDED OPINION

EUGENE A. WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ) before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901, *et seq.* Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA

and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

42 U.S.C. § 6972(b)(1) provides:

> No action may be commenced under ... this section ... prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] ...

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island* 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981). Courts have construed these provisions identically despite slight differences in wording *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700.

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpre-

tations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Council v. Callaway,* F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance,* 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.,*700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council,* 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton,* 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol,* 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia,* 761 F.2d at 78. *See also Walls v. Waste Resource Corp.,* 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train,*

519 F.2d 681 (7th Cir.1975), *cert. denied,* 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia,* 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will.... [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia,* 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental

disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33, 104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction over the RCRA claim. Because the court lacked federal jurisdiction at the time the suit was filed, it lacked pendent jurisdiction also. The federal court's power to exercise pendent jurisdiction derives from its federal jurisdiction. *See United Mine*

Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Hunter v. United Van Lines*, 746 F.2d 635, 649 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L. Ed.2d 150 (1985).

Without federal jurisdiction, a federal court has no power to hear state claims. *Hunter*, 746 F.2d at 649: "the federal court acquires its power over the [pendent] claim ... only if the court has previously properly been seized of jurisdiction. The federal court's jurisdiction over the state-law claim is entirely derivative of its jurisdiction over the federal claim." (citations omitted).

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded to dismiss and vacate the court's opinion. We reverse the award of fees to the county.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to The EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 6972 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced ... under this section

... prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged violator...." We must decide whether this requirement acts to deprive a district court of jurisdiction over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held that the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 601. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance*, 619 F.2d at 243.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM,
husband and wife, Plaintiffs,
v.
TILLAMOOK COUNTY,
a municipal corporation, Defendant.

CIVIL NO. 82-481

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (MOTION TO DISMISS)

Defendant Tillamook County seeks dismissal of plaintiffs' complaint. The motion is framed as one for summary judgment under Fed. R. Civ. P. 56. However, it is more accurately characterized as one for dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant contends that plaintiffs have failed to strictly comply with the provisions of 42 U.S.C. § 6972 under which they claim subject matter jurisdiction. *See also* 40 C.F.R. § 254.2(a)(2).

Section 6972 of the Resource Conservation and Recovery Act of 1976 (RCRA) provides for sixty (60) days notice of intent to file suit to the Environmental Protection Agency (EPA), to the relevant State authorities, and to the alleged violator. *See* 42 U.S.C. § 6972 (b)(1). Notification is required before individual enforcement action may proceed. *Id.* Tillamook claims that plaintiffs failed to notify either the EPA or the Oregon Department of Environmental Quality (DEQ), prior to the filing of this lawsuit. Because

of this defect, Tillamook argues that plaintiffs lack jurisdiction over them as well.

The purpose of the notice requirement is to allow administrative agencies an opportunity to cure any alleged violations. *South Carolina Wildlife Federation v. Alexander*, 457 F.Supp. 118, 124 (D.S.C. 1978). Defendant Tillamook County received notice from plaintiffs of their intent to file suit in April, 1981. Since then, defendant has done nothing to correct any of the alleged violations. Tillamook has also actively participated in this action since its filing in April, 1982.

Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days form that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

To grant defendant's motion based on the notice provision would be a waste of judicial resources. *Pymatuning Water Shed Citizens v. Eaton*, 644 F.2d 995, 996 (3rd Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Defendants motion to dismiss for lack of subject matter is hereby DENIED.

IT IS SO ORDERED.

DATED this 22 day of April, 1983.

Owen M. Panner
UNITED STATES DISTRICT JUDGE

APPENDIX D

PART 254 — PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

§ 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

§ 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged violator of any permit, standard, regulation, condition,

requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is allegedly to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental

Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) Failure to act. Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of

the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice

(c) Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

No. 86-42

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

OLAF A. HALLSTROM and
MARY E. HALLSTROM,
Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

I. Franklin Hunsaker*
James G. Driscoll
Thomas D. Adams

SULLIVANT, HOUSER, BAILEY
PENDERGRASS & HOFFMAN
1400 Pacwest Center
1211 S. W. Fifth Avenue
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Attorneys for Respondent

*Counsel of record

QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit correctly rule that Petitioners ("the Hallstroms") failed to comply with the notice requirements of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6972 et seq.) and therefore failed to properly invoke federal subject matter jurisdiction in that they commenced this action against Respondent ("Tillamook County")[1/] before providing the statutorily-mandated 60-day advance notice of intent to sue to the appropriate federal and state authorities?

[1/]Tillamook County is a municipal corporation with no affiliation to any parent or subsidiary or related corporation.

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STATEMENT OF THE CASE

The Hallstroms gave Tillamook County written notice of their intent to sue under RCRA on April 20, 1981. On April 9, 1982, the Hallstroms commenced this lawsuit. The Hallstroms alleged that Tillamook County had violated and was continuing to violate RCRA and that subject matter jurisdiction was therefore appropriate under 28 U.S.C. § 1331. (ERX 1-8, 16; ER 1-8, 17)[2/]

On March 2, 1983, nearly one year after they filed their lawsuit, the Hallstroms gave written notice of their claim to the Environmental Protection

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[2/]References to "ERX" and "ER" are references to the Excerpt of Record on Cross-Appeal and Excerpt of Record, respectively, both of which were submitted to the Ninth Circuit in the proceedings before that Court.

Agency ("EPA") and the Oregon Department of Environmental Quality ("DEQ"). The EPA and DEQ had no other actual notice of the Hallstroms' claim prior to the commencement of this lawsuit. (ERX 16, 37-42, 74; ER 17)

The RCRA notice provisions applicable to suits brought by citizens-plaintiffs provide in pertinent part:

> "No action may be commenced under [the citizen suit provision] of this section --
>
> "(A) Prior to sixty days after the plaintiff has given notice of the violation to --
>
> "(i) the Administrator [of the EPA];
>
> "(ii) the State in which the alleged violation occurs; and
>
> "(iii) any alleged violator of such permit, standard, regulation, condition, requirement,

> prohibition, or order. . . ."

42 U.S.C. § 6972(b)(1).

Tillamook County challenged the Hallstroms' assertion of federal subject matter jurisdiction on the ground that the notice provisions of RCRA are threshold, jurisdictional requirements that the Hallstroms failed to satisfy. (ERX 30-42) The United States District Court for the District of Oregon, however, rejected Tillamook County's argument and held:

> "Neither the EPA nor the DEQ is a party in this action. In addition, [P]laintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it [sic] finds at the Tillamook County landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

> "To grant [D]efendant's [M]otion [for Summary Judgment] based on the notice provision would be a waste of judicial resources." (ERX 82)

Following trial and the entry of a Final Judgment and Decree (ERX 81-82; ER 176-77), the Hallstroms appealed certain rulings made by the District Court in connection with their RCRA claim and their claims based on state law. Tillamook County cross-appealed from the District Court's ruling regarding the Hallstroms' noncompliance with the RCRA notice requirements. The Court of Appeals reversed the District Court's ruling on the RCRA notice requirements and held that the Hallstroms' failure to satisfy the RCRA notice requirements precluded the exercise of federal subject matter jurisdiction. Hallstrom v. Tillamook

County, 844 F.2d 598 (9th Cir. 1988). The Court reasoned:

> "Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.
>
> "Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a non-adversarial setting before suit is filed. Litigation should be a last resort only after other efforts have failed. . . . We believe that the 'jurisdictional prerequisite'

approach is more consistent with this design than the pragmatic approach."

844 F.2d at 601 (citation omitted).

The Hallstroms subsequently filed a Petition for Rehearing and a Suggestion for Rehearing en banc which were denied and rejected, respectively.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in this matter is consistent with this Court's decision in Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), and with decisions of other courts of appeals subsequent to Middlesex. There is no conflict between federal courts of appeals that have ruled on this statutory notice issue since this Court's decision

in Middlesex. Moreover, the decision in this matter is a straightforward application of the plain, unambiguous language in RCRA.

ARGUMENT

The decision of the Court of Appeals does not warrant review by this Court. That decision is entirely consistent with prior decisions of this Court and with recent decisions of other federal courts of appeals. For the reasons that follow, the Hallstroms' Petition for Writ of Certiorari should be denied.

1. There is no conflict between the federal circuit courts of appeals regarding the jurisdictional character of the notice provisions in federal environmental statutes, and the decision in this matter is consistent with the decision of this Court in Middlesex.

The Court of Appeals correctly ruled in this matter that the notice provisions in RCRA are jurisdictional prerequisites to the maintenance of a lawsuit by citizens-plaintiffs, such as the Hallstroms. That ruling reaches the identical result and adopts the reasoning expressed in Garcia v. Cecos Int'l, Inc., 761 F.2d 76 (1st Cir. 1985). Likewise, the decision in this matter is entirely consistent with the results and reasoning of the Sixth and Seventh Circuits in Walls v. Waste Resource Corp., 761 F.2d 311 (6th

Cir. 1985), and City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), cert. den., 424 U.S. 927 (1976), respectively. Moreover, the decision in this matter is consistent with this Court's decision in Middlesex, supra.

The Hallstroms erroneously argue that the decision of the Court of Appeals in this matter "directly conflicts" with decisions of the Second, Third, Eighth and District of Columbia Circuits. (Pet. 7-8) Each of the decisions they cite -- Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975); Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231 (3d Cir. 1980), cert. den., 449 U.S. 1096 (1981); Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A., 700 F.2d 459 (8th Cir. 1983); and Natural Resources Defense

Council v. Train, 510 F.2d 692 (D.C. Cir. 1974) -- is distinguishable from this matter.

In Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A., supra, the Court held that it lacked jurisdiction to directly review an order by the EPA granting "interim status" to an operator of a proposed hazardous waste landfill facility. In considering which district court the matter should be transferred to, the Court acknowledged that a citizens' suit under RCRA "requires a notice to the Administrator of EPA, the state, and the alleged violator sixty (60) days prior to the filing of [a lawsuit]," but noted "that the purpose of such notice has long since been satisfied in the instant action." 700 F.2d at 463. The Court

failed to explain why the purpose of such notice had been "satisfied," but observed that the EPA had conceded at oral argument that no issue existed concerning the sufficiency of the notice provided by the citizens-plaintiffs. 700 F.2d at 463, n. 5.

The remaining decisions cited by the Hallstroms all predate this Court's decision in Middlesex, supra. In that matter, an organization sued various state and federal authorities under the Clean Water Act and the Marine Protection, Research and Sanctuaries Act to enjoin the dumping of wastes into the New York Harbor and the Hudson River. This Court held that the citizens-plaintiffs had no implied private right of action under those statutes or under 42 U.S.C. § 1983

to enforce alleged violations of statutory standards and also were prohibited from proceeding as citizens-plaintiffs because they failed to comply with the statutory notice provisions. 453 U.S. at 13-21. With respect to the jurisdictional character of those provisions, this Court ruled:

> "These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures -- which respondents here ignored -- including in most cases 60 days' prior notice to potential defendants."

453 U.S. at 14 (footnote omitted).

This Court's decision in Middlesex indicates clearly that the notice provisions in federal environmental statutes mean precisely what they say: advance notice is required prior to the

commencement of a lawsuit by a citizen-plaintiff. Plaintiffs cite no authority from any federal appellate court which has interpreted or applied this Court's decision in Middlesex. Indeed, the only federal appellate courts that have interpreted Middlesex have required strict adherence to the statutory notice requirements. See, Walls v. Waste Resource Corp., supra, 761 F.2d at 316-17; Garcia v. Cecos Int'l, Inc., supra, 761 F.2d at 81. The decision of the Court of Appeals in this matter imposes the same standard. Thus, since this Court's decision in Middlesex, the First, Sixth and Ninth Circuits have ruled uniformly that the notice provisions in federal environmental statutes have jurisdictional significance and must be strictly applied.

Clearly, there is no conflict among the circuit courts of appeals and no reason to review the decision in this matter.

2. The decision of the Court of Appeals in this matter is a straightforward application of the plain, unambiguous statutory requirements of RCRA.

The Hallstroms erroneously argue that the decision in this matter is somehow contrary to this Court's recent decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. ___, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). (Pet. 8-10) In Gwaltney, this Court held that citizens-plaintiffs may not sue under the Clean Water Act for wholly past violations of the standards set forth in that statute. In reaching that conclusion, this Court reasoned that

any other interpretation of the Clean Water Act would render "incomprehensible" and purely "gratuitous" the requirement that the alleged violator be given 60 days advance notice of intent to sue. 98 L. Ed. 2d at 318-19. This Court did not, as the Hallstroms erroneously suggest, imply that the purpose of the 60-day notice requirement is to further some objective other than nonjudicial resolution of the alleged problem. Furthermore, this Court observed only that the purpose of notice to the alleged violator is to permit it an opportunity to bring itself into compliance with statutory standards and make a citizen suit unnecessary. Id. This Court did not articulate the purpose of notice to the EPA and the coordinate state agency, whom the Hallstroms failed

to timely notify in this matter.

This Court's decision in Gwaltney is entirely consistent with the decision in this matter. In Gwaltney, this Court restated the "well-settled" principle that the starting point for interpreting a statute is the language of the statute itself. 98 L. Ed. 2d at 316. That is precisely the approach expressly adopted and undertaken by the Court of Appeals in this matter:

> "Judge Wisdom wrote [in Garcia v. Cecos Int'l, Inc., supra], 'The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less "constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language." . . . The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that

> cannot be altered by the courts.'. . ."

Hallstrom, supra, 844 F.2d at 600, quoting Garcia v. Cecos Int'l, Inc., supra, 761 F.2d at 78-79.

Like Gwaltney, the decision in this matter is a straightforward exercise in statutory interpretation. There is nothing remarkable about the result reached by the Court or the analysis employed to get there. Congress was explicit in its requirement that a citizen-plaintiff who intends to sue under RCRA provide 60 days' advance notice to the alleged violator, the EPA and the coordinate state agency. The Hallstroms did not comply with that requirement and their noncompliance precluded federal subject matter jurisdiction based on the plain language of RCRA, based on this

Court's decisions in Gwaltney and Middlesex, and based on the uniform decisions of other federal courts of appeals that have followed and applied Middlesex.

CONCLUSION

For the reasons set forth above, the Hallstroms' Petition for Writ of Certiorari should be denied.

DATED: August 4, 1988.

Respectfully submitted,

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(3)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONERS' REPLY BRIEF

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

1. Middlesex Does Not Resolve The Issue Presented.

In *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court did not decide whether notice was a jurisdictional or procedural requirement for environmental citizen suits, nor did this Court discuss the

purpose of the notice requirement. Instead, this Court focused its attention and expressly limited its review to three issues:

> (i) whether the FWPCA [Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*] and MPRSA [Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.*] imply a private right of action independent of their citizen-suit provisions, (ii) whether all federal common-law nuisance actions are pre-empted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance.

Id. at 10-11.

This Court said the implied right of action question was one of determining Congress' intent. To do that, this Court outlined the "unusually elaborate enforcement provisions" of FWPCA and MPRSA and mentioned that the citizen suit provisions require compliance "with *specified procedures*—which respondents here ignored—including in most cases 60 days' prior notice to potential defendants." *Id.* at 14 (emphasis added). This Court then concluded:

> In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA.

Id.

As can be seen from the context, this Court did not consider or decide whether the 60-day notice provision was a jurisdictional or procedural requirement. The language this Court chose is itself inconclusive on the question presented here. Indeed, the use of the words "specified procedures" suggests that notice is a procedural, rather than a jurisdictional, requirement.

Furthermore, although this Court sought to discover whether Congress intended to imply a private right of action by studying the statutory scheme, no attempt was made, because none was required, to discover whether Congress intended notice to be a procedural or a jurisdictional prerequisite.

Also, the sentence in *Middlesex* that respondent interprets is dictum, and this Court does not decide important issues based on dicta. In *Permian Basin Area Rate Cases,* 390 U.S. 747 (1970), this Court rejected an argument based on dictum:

> The dictum is imprecise, but even if it were not, we could not agree that it can now be controlling. The construction of the Natural Gas Law was not even obliquely at issue in *Bowles,* and *this Court does not decide important questions of law by cursory dicta in unrelated cases.*

Id. at 775 (emphasis added).

Finally, it is worth noting that the Ninth Circuit did not discuss or rely on *Middlesex* when it concluded that the notice requirement is jurisdictional. It is also worth noting that in *Middlesex,* none of the defendants, including the EPA and the State Departments of Environmental Quality, received any notice. Here, although the EPA and the State did not receive prior notice, they were not parties.

2. Respondent's Argument That There Is No Conflict After Middlesex Is Wrong.

This Court should reject respondent's invitation to ignore the truth and pretend the 4-4 split among the Circuits does not exist. As respondent concedes, if cases decided before *Middlesex* are not ignored, there is a direct conflict among the Circuits that have decided the issue presented. As noted above, *Middlesex* is inconclusive, so the decisions of the Second, Third, and District of Columbia Circuits cannot be simply ignored. *Natural Resources Defense Council v. Callaway,* 524 F.2d 79 (2d Cir. 1975) (procedural interpretation); *Susquehanna Valley Alliance v. Three Mile Island,* 619 F.2d 231 (3d Cir. 1980) (procedural interpretation); and *Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C. Cir. 1974) (procedural interpretation).

Even if only cases decided after *Middlesex* are considered, there is still a conflict. In *Hempstead Cty. & Nevada Cty. Project v. U.S.E.A.,* 700 F.2d 459 (8th Cir. 1983), the Eighth Circuit held that the notice requirement was procedural while the First Circuit in *Garcia v. Cecos Int'l, Inc.,* 761 F.2d 76 (1st Cir. 1985) and the Sixth Circuit in *Walls v. Waste Resource Corp.,* 761 F.2d 311 (6th Cir. 1985) decided that the notice requirement was jurisdictional.

Respondent's attempt to distinguish *Hempstead* fails. In that case, the circuit court decided it was best to transfer the RCRA case to the district court if the district court would have had subject matter jurisdiction when the action was filed. Thus, it was necessary to consider whether the failure to give the 60-day notice to the EPA precluded the district court's subject matter jurisdiction. In holding that the purpose of the notice provision had long been satisfied, the court held that the notice requirement was not jurisdictional. If the notice requirement had been jurisdictional, then the district court would not have had subject matter jurisdiction, and the court would have had no alternative but to dismiss the case.

Although, as respondent noted, the EPA said it would not raise any "issue regarding the technicalities of the notice provision" in the district court, it is well established that the parties cannot confer subject matter jurisdiction by agreement. Thus, the question whether the notice requirement is a jurisdictional prerequisite was squarely presented. Therefore, respondent's argument that there is no conflict after *Middlesex* is wrong.

3. Respondent's Discussion Of Gwaltney Is Erroneous.

This Court wrote in *Gwaltney of Smithfield v. Chesapeake Bay Found.,* — U.S. —, 108 S.Ct. 376, 382 (1987), that the 60-day period gives the EPA and the State time to file their own enforcement actions in either federal or state court, and that the notice provision also gives the violator time to come into complete compliance. This Court expressly said that the purpose of the notice to the alleged violator was to give it time to bring itself into complete compliance, thereby rendering unnecessary a citizen's suit. Although this Court did not specifically begin a sentence with the words "The purpose of the notice provision to the EPA and the State . . .," the import of this Court's discussion of the notice provision to the EPA and the State is clear enough. The purpose of the notice

provision is to give the EPA and the state time to file their own enforcement actions, thus rendering unnecessary a citizen's suit.

If the only kind of action by the EPA or the state that can stop a citizen's suit is a civil enforcement proceeding filed *in court,* then the Ninth Circuit's concern (and that of *Garcia* and *Walls*), that a pragmatic interpretation of the notice provision would not encourage nonjudicial resolution, is not relevant. If the Ninth Circuit's primary reason for interpreting the notice provision as jurisdictional is not one supported by this Court's analysis of the purpose of the notice provision, then the Ninth Circuit's decision should be reversed.

4. When The Circuits Conflict On How To Interpret A Statute, And One Interpretation Accomplishes The Intent Of Congress, And The Other Interpretation Defeats The Intent Of Congress, This Court Should Interpret The Statute To Accomplish The Intent Of Congress.

As respondent noted, "the *starting point* for interpreting a statute is the language of the statute itself." *Gwaltney, supra,* 108 S.Ct. at 381 (emphasis added). The reason why the language of the statute itself is the starting point, and not the end point, is because the intent of Congress is not always accurately reflected in the words it has chosen. As noted previously, the purpose of the statutory interpretation is to determine how Congress intended its statute to apply to the case at hand. *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 577 (1982) (Stevens, J., dissenting).

It is inconceivable that Congress intended the result in this case. The purpose of the notice provision is to

give time to act. If no action is taken, then the citizens should proceed to protect the environment. After all, it is the environment that Congress thought to protect, and the right of citizens to sue is not one intended to protect citizen rights, but the purity of the environment. As Senator Hart observed concerning citizen suits to enforce the Clean Air Act, 42 U.S.C. § 7604:

> First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. *It will be the rare, rather than the ordinary person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.*

116 Cong.Rec. 33104 (1970) (emphasis added).

Respondent concludes that there is nothing remarkable about the result in this case. Petitioners disagree. This case has involved four years of litigation, four days of trial, a finding of an RCRA violation, and the citizen plaintiffs have spent $95,000 to obtain protection for the environment.

Petitioners at least partly complied with the letter of the notice provision when they gave notice to respondent. Despite this notice, respondent continued to pollute the environment and still does so. Congress surely did not intend that a citizen's failure to give notice is worse than polluting the environment.

The interpretation that respondent advocates protects the polluter at the expense of the environment and the private attorney general. This is not what Congress

intended, and this is why this Court has the power to go beyond the letter of the statute to give effect to what Congress intended. *Holy Trinity Church v. United States,* 143 U.S. 457, 459 (1892) (court will consider whole legislation to avoid absurd results and to accomplish intention of legislature).

Respectfully submitted,

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(4)

No. 88-42

In the Supreme Court of the United States

OCTOBER TERM, 1988

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioners' action to enforce standards created under the Resource Conservation and Recovery Act must be dismissed because petitioners did not give the Administrator of the Environmental Protection Agency notice of this action 60 days before it was filed, as required by 42 U.S.C. 6972(b)(1).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners own a dairy farm located next to the Tillamook County landfill in Oregon. Petitioners believe that the landfill violates standards established under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* Accordingly, on April 20, 1981, petitioners mailed a notice to the County of their intent to bring an action to compel compliance with RCRA. Petitioners, however, did not notify the Administrator of the Environmental Protection Agency (EPA) nor the Oregon Department of Environmental Quality (DEQ) of their intent to sue. Pet. App. 2a.

On April 9, 1982, petitioners filed this action against the County (Pet. App. 2a). Petitioners stated a claim under Section 7002(a) of RCRA (42 U.S.C. 6972(a)), which allows private persons to bring actions to enforce requirements established under the statute. Petitioners also set forth state-law claims for inverse condemnation, trespass, and nuisance (Pet. App. 2a).

On March 1, 1983, the County moved for summary judgment on the ground that petitioners had failed to comply with Section 7002(b)(1) of RCRA. That Section provides that no private "action may be commenced under [RCRA] * * * prior to sixty days after the plaintiff has given notice of the violation to * * * the Administrator [of the EPA and] the State in which the alleged violation occurs" (42 U.S.C. 6972(b)(1)).[1] On March 2, 1983, petitioners sent a notice of their intent to sue to the Administrator and to the DEQ. Petitioners informed the governmental agencies that they intended to refile their action if the court dismissed their case. Pet. App. 19a.

2. On April 22, 1983, the district court denied the County's motion for summary judgment. The court stated that the purpose of the notice provision in Section 7002(b), 42 U.S.C. 6972(b), was to give the administrative agencies the chance to bring their own court actions (Pet. App. 19a). Here, the court observed, the EPA and the DEQ had expressed no interest in bringing an action. The district court concluded, therefore, that "[t]o grant defendant's motion based on the notice provision would be a waste of judicial resources" (*ibid.*).

Following a trial in July 1985, the district court ruled that the County's landfill did violate standards created

[1] RCRA does not have a 60-day notice period for private actions alleging violations of the statute's hazardous-waste provisions. See 42 U.S.C. 6972(b)(2)(A) (Supp. IV 1986). This case, however, is not such an action.

under RCRA (Pet. App. 2a).[2] The court therefore ordered the County to remedy the violation within two years (*ibid.*). A jury, however, found in favor of the County on all three state-law claims (*ibid.*). The district court later denied petitioners' request for an award of attorneys' fees and expert witness fees.

3. A divided panel of the court of appeals vacated the judgment and remanded the case to the district court to be dismissed. The court ruled that the 60-day notice requirement in Section 7002(b) is a jurisdictional prerequisite to bringing a private suit under RCRA (Pet. App. 6a). The court explicitly agreed with the First Circuit in *Garcia* v. *Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1985), that "the plain language of [§ 7002(b)] commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language' " (Pet. App. 4a). The court further noted that its view of Section 7002(b) is supported by the provision's purpose "of encouraging non-judicial resolution of environmental conflicts" (*id.* at 4a-5a).[3]

In dissent, Judge Pregerson stated that "[o]ne of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute" (Pet. App. 7a). Accordingly, he would not require notice 60 days before an action is filed. Rather, Judge Pregerson "would interpret the statute to require that 60 days elapse before the district court may act" (*ibid.*). He stated that his view "furthers the goal of agency enforcement" by "allow[ing] the agency to consider the alleged violation for 60 days" (*ibid.*).

[2] The district court found that an offensive "leachate mixes with rain run-off and runs down" through petitioners' property (C.A. App. 164).

[3] The court of appeals amended its opinion on April 7, 1988, to make it clear that, because the district court lacked jurisdiction over petitioner's federal-law claim, it lacked pendent jurisdiction over the state-law claims as well (Pet. App. 14a-15a).

DISCUSSION

1. Until 1970, the major federal environmental laws could be enforced only by the government. See, *e.g.*, Clean Air Act of 1963, Pub. L. No. 88-206 § 5, 77 Stat. 396. In Section 304(a) of the Clean Air Amendments of 1970, however, Congress gave private citizens the right to bring an action to enforce emission standards established under the Clean Air Act. See 42 U.S.C. 7604(a). Section 304(b) of the Amendments provided that a citizen could commence an action 60 days after he notified the defendant and the EPA of the alleged violation. Since 1970, Section 304 of the Clean Air Amendments has served as a model for similar provisions in at least 12 other federal environmental statutes, including Section 7002 of RCRA.[4]

The courts of appeals have taken different approaches in cases where the plaintiff failed to give the required notice to the EPA. In *Garcia* v. *Cecos Int'l, Inc.*, *supra*, the First Circuit adopted the position followed by the Ninth Circuit in this case. It held that a case must be dismissed for want of jurisdiction "where the complaint is filed less than sixty days after actual notice to the agency

[4] See also Section 505(b)(1) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(b)(1); Section 310(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9659(d)(1) (Supp. IV 1986); Section 16(b)(1) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(b)(1); Section 11(g)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2); Section 105(g)(2) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(2); Section 12(b)(1) of the Noise Control Act of 1972, 42 U.S.C. 4911(b)(1); Section 23(a)(2) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(2); Section 1449(b)(1) of the Safe Drinking Water Amendments of 1977, 42 U.S.C. 300j-8(b)(1); Section 520(b)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(b)(1); Section 20(b)(1) of the Toxic Substances Control Act, 15 U.S.C. 2619(b)(1); Section 11(b)(1) of an Act to Prevent Pollution from Ships, 33 U.S.C. 1910(b)(1).

and the alleged violators" (761 F.2d at 82). The Seventh Circuit has also taken that position in a suit by a private party against the EPA to compel the Administrator to take steps allegedly required by the Clean Air Act. See *City of Highland Park* v. *Train*, 519 F.2d 681, 690-691 (1975), cert. denied, 424 U.S. 927 (1976).

The Third Circuit has a different rule. The plaintiff in *Pymatuning Water Shed Citizens for a Hygienic Environment* v. *Eaton*, 644 F.2d 995 (1981), failed to give the EPA and state authorities notice before it commenced an action under the Federal Water Pollution Control Act. On appeal, the defendant argued that the district court should have dismissed the action. The Third Circuit disagreed. The Third Circuit held that the district court followed the correct procedure when it "stayed its proceedings until notice was given to the proper persons and entities. This stay allowed them the time contemplated by the statute for taking appropriate action" (*id.* at 997). Accord *Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) ("sixty day notice provision should be applied flexibly to avoid hindrance of citizen suits").[5]

The Sixth Circuit apparently follows a third approach. In *Walls* v. *Waste Resource Corp.*, 761 F.2d 311 (1985), the plaintiffs failed to give the required notice before they

[5] We disagree with respondent's contention (Br. in Opp. 11-13) that the conflict in the circuits was implicitly resolved by this Court's decision in *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981). The issue in that case was whether there was an implied private right of action under the Federal Water Pollution Control Act. In resolving that issue, the Court noted (*id.* at 14) the statute's express provision authorizing citizen suits if the plaintiff gives proper notice 60 days before he files suit. The Court, however, had no occasion to address the consequences of failing to give such notice. Thus, although the Court stressed the importance of the notice provision, the Court did not decide whether an action commenced without prior notice must be dismissed (the Ninth Circuit approach) or stayed pending proper notice (the Third Circuit approach).

brought their action under RCRA. The Sixth Circuit held that the notice provision "is a jurisdictional prerequisite to bringing suit" (*id.* at 316). The court therefore held that the district court properly dismissed the RCRA claim. The court of appeals stated, however, that its decision was "without prejudice to any request plaintiff may make to file an amended complaint respecting notice" (*id.* at 317). Accordingly, the Sixth Circuit seemingly has sanctioned an approach that allows a plaintiff to give the required notice after he files suit if he then amends his complaint to include allegations of adequate notice.[6]

2. Experience shows that plaintiffs sometimes fail to give the required notice before bringing a private enforcement suit under the environmental laws. This leads to wasteful litigation over the proper procedure to follow—whether to dismiss the action or to stay the proceedings. In those circuits that have not adopted a rule, the uncertainty can be especially troubling. For example, a plaintiff's case may be stayed by the district court, later adjudicated, and then dismissed on appeal so that the district court's judgment becomes void. This Court can

[6] Contrary to the court of appeals' opinion (Pet. App. 3a), the Second, Eighth, and District of Columbia Circuits have not addressed the precise issue presented in this case. In *NRDC* v. *Train*, 510 F.2d 692 (D.C. Cir. 1974), the court allowed a suit against the Administrator to continue in the absence of prior notice because the court held that the plaintiff stated a claim under the Administrative Procedure Act, which does not require prior notice (*id.* at 703). The Second Circuit agreed with that holding in *NRDC* v. *Callaway*, 524 F.2d 79, 83 (1975). In *Hempstead County & Nevada County Project* v. *EPA*, 700 F.2d 459 (1983), the Eighth Circuit transferred an action brought under RCRA to the district court after it held that it lacked jurisdiction over the plaintiffs' claim. The court stated that the notice provision in Section 7002 had been satisfied (700 F.2d at 463) so that the plaintiffs' action could properly be commenced in the district court.

end the uncertainty and the fruitless litigation by resolving the conflict in the circuits.

Moreover, the different approaches adopted by the courts of appeals can cause significantly different results. RCRA, like many other environmental statutes, authorizes the Administrator to issue orders assessing civil fines. See 42 U.S.C. 6928(a). A private citizen may file an action to enforce such an order. But RCRA allows a citizen to bring such an action only if the defendant is currently "alleged to be in violation of any" RCRA requirement (42 U.S.C. 6972(a)(1)(A) (Supp. IV 1986)). See *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, No. 86-473 (Dec. 1, 1987). Accordingly, if a plaintiff's action is dismissed for lack of proper notice, and the defendant promptly comes into compliance with RCRA, the plaintiff may not file his action again. By contrast, if the plaintiff's case were stayed instead of dismissed, the same defendant would remain liable for civil penalties and possibly attorneys' fees in the private suit. Thus, we believe that the Court should grant the petition to resolve the conflict in the courts of appeals.

3. a. The decision of the Ninth Circuit in this case follows from the plain language of Section 7002. See generally *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (statute's "language must ordinarily be regarded as conclusive"). Section 7002(b)(1) states that "[n]o action may be commenced under" Section 7002 until "sixty days after the plaintiff has given notice" to the EPA, the state, and the alleged violator. And Rule 3 of the Federal Rules of Civil Procedure defines when an action is "commenced": "A civil action is commenced by filing a complaint with the court." Thus, a private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he has given the required notice.

Section 7002 does not provide, as petitioners necessarily contend, that a plaintiff may file a RCRA claim and then give the proper notice as long as the court does not rule on the plaintiff's claim for 60 days. We can imagine such a statutory scheme, but that is not the scheme that Congress adopted. The court of appeals' decision in this case, therefore, accurately followed the language of Section 7002.

b. Contrary to petitioners' contention, the Ninth Circuit's holding is not so patently inconsistent with the will of Congress that the Court may appropriately "go beyond the letter of the statute" (Reply Br. 8). Congress patterned Section 7002 of RCRA after Section 304 of the Clean Air Amendments of 1970. The legislative history of Section 304, in turn, shows that Congress intended the notice provision to play an important role. Proponents of Section 304 were concerned that private-enforcement suits could interfere with governmental enforcement of the Clean Air Act. See *Hearings on S. 3229, S. 3466 & S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 1184 (1970). And opponents of Section 304 testified that citizen suits could create an unproductive adversary relationship between the public, government, and industry. See *id.* at 1570. The Senate Subcommittee on Air and Water Pollution addressed those concerns by adding the provision requiring a plaintiff to give prior notice to the alleged violator and the appropriate government agencies. See 116 Cong. Rec. 32,381 (1970). Thus, as the Sixth Circuit stated in *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 317 (1985), the notice provisions in environmental statutes are "viewed by Congress as crucial in defining the proper role of the citizen suit." The notice period allows " 'the EPA, state, and violator sixty days to resolve the

problem without being harassed by a lawsuit.' " *Garcia* v. *Cecos Int'l, Inc.*, 761 F.2d at 82 (citation omitted).

In *Gwaltney of Smithfield* v. *Chesapeake Bay Found., supra*, this Court noted that one of the purposes of the notice provisions is to give the alleged violator "an opportunity to bring itself into complete compliance with the [law] and thus likewise render unnecessary a citizen suit" (slip op. 9). That purpose is not fulfilled simply by the court's not acting on a plaintiff's complaint for 60 days. As the court of appeals in this case observed, "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise [are] less likely" (Pet. App. 5a). Accordingly, the court of appeals correctly interpreted Section 7002 of RCRA in holding that a citizen suit must be dismissed, not merely stayed, if the plaintiff did not give the required prior notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
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Attorneys

FEBRUARY 1989

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(5)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed July 6, 1988
Certiorari Granted March 20, 1989

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RELEVANT DOCKET ENTRIES

PLAINTIFF	DEFENDANT
OLAF A. HALLSTROM, et al.	TILLAMOOK COUNTY

DOCKET NO. 82-481

DATE	NR.	PROCEEDINGS
1982		
APR 9	1)	COMPLT FOR VIOLATIONS OF SOLID WASTE DISPOSAL ACT, TRESPASS & NUISANCE – DEMAND FOR J/T
June 18	7)	ANS & demand for J/T
1983		
MAR 2	15)	Deft's Mot for s/j (oa req), affids
22	19)	Memo in opposition to motion for S/J
APR 1	20)	Reply to pltfs' memo in oopos to deft's mot for S/J
22	22)	ORD denying deft's mot for s/j (mot to dismiss) e/m 4-25 s/4-22-83 PA ntfd
JUN 8	())	PTO LODGED
1985		
SEP 30	120)	OPINION & ORD Deft ord to submit proposal outlining steps nesc to achieve perm & complete containment of leachate w/in boundaries of landfill site w/in 60 days entry of this ord. Claims for atty fees be addressed in supp submissions

by parties. This my finds of fact & conclusions of law per Rule 52(a) FRCP. e/m 10/1 s JU 9/30/85 ntfd

JUN 23 129) Final Judgment & decree 1) deft comply w/terms of ord & decree 6/23/86 & 2) deft have judgment in its favor on plt's claims for trespass, nuisance & inverse condemnation. e/m & s JU 6/23/86 ntfd

---

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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 COMPLAINT FOR VIOLATIONS OF SOLID WASTE DISPOSAL ACT, TRESPASS, AND NUISANCE DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial and allege:

I

JURISDICTION AND VENUE

1. The jurisdiction of this court is predicated on 28 U.S.C. §1331 (federal question).

2. The first count arises out of violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§6901-87. This court has jurisdiction of this claim pursuant to 42 U.S.C. §6972(a).

3. This court has jurisdiction of the second, third, and fourth counts because they arise out of facts that are substantially identical to the first count.

4. The amount in controversy exceeds $10,000 exclusive of interest and costs.

5. Venue is proper in this judicial district under 15 U.S.C. §1391(b) and under 42 U.S.C. §6972 because defendant resides here, the claim arose in this judicial district, and the violations of the Solid Waste Disposal Act occurred in this judicial district.

II

PARTIES

6. Plaintiffs are Oregon residents who own and live on farmland adjacent to an open dump owned and operated by defendant.

7. Defendant is an Oregon county and a municipal corporation duly incorporated and organized under Oregon law.

III

COUNT ONE

(Violation of Solid Waste Disposal Act)

8. Defendant owns and operates an illegal open dump, the Tillamook County Landfill, in Tillamook County, Oregon, in violation of the following statutes and regulations:

42 U.S.C. §6945
40 C.F.R. §§241.200-1, 241.202-1, 241.203-1, 241.204-1, 241-205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
40 C.F.R. §§257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6, and 257.3-7.
40 C.F.R. §§264.1-.77.
40 C.F.R. §§265.1-.94 and 265.220-.315.

9. The Tillamook County Landfill is being operated as an illegal open dump. Hazardous wastes have been disposed of on the site on a regular basis with little or no controls. Surface water and leachate discharged from the site onto plaintiffs' farmland and the groundwater under the site and plaintiffs' farmland are contaminated with dangerously high concentrations of hazardous wastes and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards and adversely affect the quality of air around plaintiffs' residence and farmland. Conditions are maintained at the site that are favorable for the harboring, feeding, and breeding of vectors. The surface area of exposed solid waste has not been minimized, adequate and effective cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to direct the leachate produced at the site have not been effective. The leachate produced at the site has been allowed to drain onto plaintiffs' land, the tidewater areas adjacent to the site, and into Sutten Creek and the Tillamook River.

10. More than 60 days prior to the commencement of this action, plaintiffs served a notice of intent to file a citizen's suit pursuant to 42 U.S.C. §6972 and 40 C.F.R.

§254. Since service of the notice of intent to sue, contamination of groundwater has substantially increased and the leachate treatment system has failed.

11. Plaintiffs are entitled to injunctive relief requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.R.F. §§264.50-.56, 264.110-120, 265.50-.56, and 265.112-.118.

12. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it has been brought in compliance with the Solid Waste Disposal Act and regulations enacted thereunder.

13. As a result of defendant's conduct, plaintiffs' residence and farmland and the groundwater beneath have been contaminated with hazardous wastes and dissolved solids, and the value of plaintiffs' farmland has been reduced by more than $10,000, the exact amount to be determined at trial.

14. Under 42 U.S.C. 6972, plaintiffs are entitled to recover the costs of this litigation, including reasonable attorney and expert witness fees. A reasonable sum to award plaintiffs for their costs of the litigation is $35,000.00.

COUNT TWO

(Nuisance)

15. Plaintiffs reallege paragraphs 1 through 10 and 13, above.

16. Defendant's conduct has unreasonably interfered and continues to interfere with plaintiffs' use and enjoyment of their residence and farmland.

17. Plaintiffs have requested and given notice to defendant to control the continuing contamination of the surrounding land and water, but defendant has failed and refused to do so.

18. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

19. Plaintiffs have been damaged by more than $10,000, the exact amount to be determined at trial, because of defendant's unreasonable interference with their use and enjoyment of their residence and farmland.

COUNT THREE

(Trespass)

20. Plaintiffs reallege paragraphs 1 through 10 and 13, above.

21. Defendant's conduct has caused and continues to cause leachate to be discharged upon plaintiffs' residence and farmland and to contaminate the groundwater beneath plaintiffs' residence and farmland without the consent and contrary to the desire of plaintiffs.

22. Such entry and contamination is inconsistent with plaintiffs' ownership of their farmland, and is in violation of plaintiffs' right to exclusive possession.

23. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

COUNT FOUR

(Inverse Condemnation)

23. Plaintiffs reallege paragraphs 1 through 10, 16, 17, 21, and 22, above.

24. Defendant's conduct has substantially interfered and continues to substantially interfere with plaintiffs' use and enjoyment of their residence and farmland.

25. Defendant is authorized to exercise eminent domain, and it could have exercised eminent domain in pursuit of operating the Tillamook County Landfill.

26. Defendant's conduct constitutes a wrongful taking of plaintiffs' land for public use without compensation.

27. As a result of defendant's wrongful taking of plaintiffs' land, plaintiffs have been damaged by more than $10,000, the exact amount to be determined at trial.

28. Defendant's conduct was and continues to be willful and intentional. Exemplary damages should be assessed against defendant in the amount of $100,000.00 to deter defendant and others from similar conduct.

29. Under ORS 20.085, plaintiffs are entitled to recover reasonable attorney fees incurred in this case. A

reasonable sum to award plaintiffs for their attorney fees is $25,000.00.

WHEREFORE, PLAINTIFFS PRAY for the following relief against defendant:

1. An injunction requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.R.F. §§264.50-.56, 264.110-120, 265.50-.56, and 265.112-.118.

2. An injunction restraining defendant from operating the Tillamook County Landfill until it has been brought in compliance with the Solid Waste Disposal Act and regulations enacted thereunder.

3. An injunction restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

4. An injunction restraining defendant from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

5. Damages in an amount greater than $10,000 caused by defendant's unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

6. Damages in an amount greater than $10,000 caused by defendant's trespass on and under plaintiffs' residence and farmland.

7. Damages in an amount greater than $10,000 caused by defendant's wrongful taking of plaintiffs' residence and farmland.

8. Exemplary damages in the amount of $100,000.

9. Plaintiffs' costs of this litigation, including $25,000 for reasonable attorney fees and $10,000 for expert witness fees.

10. Plaintiffs' costs and disbursements incurred in this case.

11. Such other relief as the court deems just and equitable.

DATED this 9 day of April, 1982.

Respectfully submitted,
ESLER & SCHNEIDER

By: /s/ Kim T. Buckley
Kim T. Buckley
Of Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 ANSWER AND DEMAND FOR JURY TRIAL

Defendant alleges:

FIRST DEFENSE

1. Defendant admits that it is a municipal body duly organized and existing under Oregon law and that it operates a sanitary landfill in the vicinity of land owned by the Plaintiffs.

2. Except as specifically and expressly admitted above, Defendant denies each and every allegation, matter and thing contained in the Plaintiffs' Complaint and the whole thereof.

SECOND DEFENSE

This Court lacks jurisdiction of Plaintiffs' claims for the recovery of money damages for alleged violations of the Solid Waste Disposal Act (hereinafter referred to as "the Act"). The sole basis for this Court's jurisdiction of this controversy is the grant of jurisdiction at 42 USC § 6972(a). This grant of jurisdiction is limited to the enforcement of regulations or orders which have become effective pursuant to the Act.

THIRD DEFENSE

This Court lacks jurisdiction of Plaintiffs' pendant suits to enjoin Defendant. Defendant is immune from suits for injunctive relief by virtue of its sovereign immunity.

FOURTH DEFENSE

Plaintiffs have failed to commence this action within the time allowed by law.

FIFTH DEFENSE

Plaintiffs have failed to give Defendant notice of its claims as required by the Act and as required by Oregon law.

SIXTH DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted against this Defendant.

SEVENTH DEFENSE

Plaintiffs previously prosecuted an action against this Defendant in the Tillamook County Circuit Court in which the present claims were or could have been litigated to a final determination. Plaintiffs are therefore barred from maintaining the present action by the principal of *res judicata*.

EIGHTH DEFENSE

The matters of which Plaintiffs complain constitute the performance of or the failure to exercise or perform discretionary functions for which this Defendant is immune from liability under Oregon law.

NINTH DEFENSE

There is no basis under the Act for the recovery of punitive or exemplary damages, and Plaintiffs are barred by Oregon law from the recovery of punitive or exemplary damages from this Defendant.

TENTH DEFENSE

There are no standards or regulations for the operation of a landfill in effect in Oregon which have been authorized or approved pursuant to the Act. Defendant therefore cannot have committed any violation of the Act.

ELEVENTH DEFENSE

Under 42 USC § 6972, Defendant is entitled to

recover the cost of this litigation, including reasonable attorney fees and expert witness fees.

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant prays that Plaintiffs take nothing thereby, and for its costs, disbursements and attorney fees incurred herein.

DATED this 18th day of June, 1982.

BULLIVANT, WRIGHT, LEEDY, JOHNSON, PENDERGRASS & HOFFMAN

By (SIGNED) RONALD E. BAILEY
Ronald E. Bailey

By (SIGNED) JAMES G. DRISCOLL
James G. Driscoll

Attorneys for Defendant

(Certificate of Service omitted in printing)

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED)

Defendant moves the Court for summary judgment in its favor and against the plaintiffs on the grounds that there exists no genuine dispute as to any material fact and the defendant is entitled to judgment in its favor as a matter of law. Defendant further moves the Court for a judgment in its favor and against the plaintiffs for its reasonable attorneys' fees and other litigation costs incurred herein. Defendant requests oral argument.

This motion is based on the provisions of FRCP 56; the matters on file herein; the affidavits of Ernest A. Schmidt and James G. Driscoll, attached hereto as Exhibits A and B, respectively; and the following statement of points and authorities.

POINTS AND AUTHORITIES

I.

FACTS

Plaintiffs own and reside on property located adjacent to the site of the Tillamook County Sanitary landfill in Tillamook County, Oregon. In this action, the plaintiffs assert claims for violations of the Solid Waste Disposal Act (SWDA), 42 USC § 6901-6987 and pendent claims for common law trespass and nuisance and for inverse condemnation. The plaintiffs seek both damages and injunctive relief against Tillamook County arising out of the operation of the landfill. Plaintiffs allege jurisdiction in this Court based upon the "citizen suit" provisions of SWDA, 42 USC § 6972. Plaintiffs' common law and inverse condemnation claims are based on the Court's pendent jurisdiction.

The affidavits attached as Exhibits A and B establish that the plaintiffs have never given notice of the claimed violations of the Solid Waste Disposal Act to either the State of Oregon or to the Environmental Protection Agency.

II.

LAW

Subsection (a) of 42 USC § 6972 provides that:

> "Except as provided in Subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

> (1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter;
>
> • • • •

"Any action under Paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. . . ."

Subsection (b) of the statute provides:

"Actions prohibited. – No action may be commenced under Paragraph (a)(1) of this section –

> (1) prior to 60 days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; . . . "

The Environmental Protection Agency has supplemented the provisions of Subsection (b) of 42 USC § 6972 by promulgating specific requirements concerning where the requisite notice is to be sent, in what manner, and what information is to be contained in the notice. (40 CFR § 254.1-254.3)

This notice requirement has been expressly held to be a jurisdictional prerequisite to an action by a private citizen under 42 USC § 6972. In *McCastle v. Rollins Environmental Services*, 514 F Supp 936 (M.D. La., 1981) the court stated:

> "Section 6972 (c), as amended in 1978, provides, however, that no action may be commenced under the

Act until after plaintiff has given notice to the administrator of the Environmental Protection Agency. *Notice of this sort has been held to be jurisdictional and no action may be instituted in its absence.* See *National Sea Clammers Association v. City of New York*, 616 F2d 1222 (3rd Cir. 1980), cert. granted, 449 US 917, 101 S. Ct. 314, 66 L.Ed.2d 145 (1981), dealing with a similar notice provision under the Federal Water Polution Control Act.

"It is undisputed that plaintiffs have given no notice of this action and none is alleged in the petition. Under these circumstances, it is clear that plaintiffs have not brought and could not have brought this action under 42 USC § 6972 (a)." (514 F Supp at 939). (Emphasis added).

See also the decision in *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981), interpreting and applying the identical citizen suit provisions of the federal Water Pollution Control Act (FWPCA) and the nearly identical citizen suit provisions of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA).

The District Court in the *Sea Clammers* Litigation had originally dismissed the action for failure of the plaintiffs to give the prior sixty-day notice of intent to sue required by those Acts. In describing the District Court decision, the Supreme Court stated:

" . . . With respect to the claims based on alleged violations of the FWPCA, the court noted that respondents had failed to comply with the 60-day notice requirement of the 'citizen suit' provision in §§ 505(b)(1)(A) of the Act, . . . This provision allows suits under the Act by private citizens, but authorizes only prospective relief, and the citizen plaintiffs first must give notice to the EPA, the State and any alleged violator." (453 US at 6).

The United States Court of Appeals for the Third Circuit upheld that portion of the District Court's decision, and no appeal was taken by any party to that portion of the opinion. However, the Court of Appeals went on to rule that the plaintiffs could maintain claims under FWPCA and MPRSA independent of the express citizen suit provisions and, also, under federal common law for public nuisance and under maritime tort law. (*National Sea Clammers Assn. v. City of New York, supra*). The United States Supreme Court granted certiorari to consider those portions of the Court of Appeals opinion.

The Supreme Court vacated the Court of Appeals decision, and ruled that Congress intended the express enforcement provisions of both Acts to be exclusive. Accordingly, the Supreme Court held the plaintiffs barred to maintain any suit or action under any legal theory or form of action except as expressly set forth in the Acts. Since the plaintiffs had failed to comply with the 60-day prior notice requirement and therefore could not maintain their action under the express statutory provisions, they were wholly barred from proceeding on those claims in federal court.

Applying the *Middlesex County* decision to the identical language in SWDA and the present circumstances, it is apparent that these plaintiffs are barred from proceeding further in this Court on these claims. The failure to comply with the 60-day prior notice requirement deprives the Court of jurisdiction under the citizen suit provisions of SWDA, and there is no other basis available to plaintiffs for federal jurisdiction.

III.

CONCLUSION

This Court's jurisdiction is based entirely on plaintiffs' claims for violations of the solid Waste Disposal Act. However, the provisions of that Act authorizing private suits by citizens expressly require the plaintiffs to give notice to both the Administrator of the EPA and the State of Oregon more than 60 days prior to commencing their lawsuit. No such notice has been given, and this Court therefore lacks jurisdiction of these claims.

IV.

ATTORNEYS' FEES AND COSTS

Subsection (e) of 42 USC § 6972 provides:

> "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is approproate."

In the event the Court grants defendant's Motion for Summary Judgment set forth immediately above, this defendant moves the court for its further Order awarding judgment in its favor and against the plaintiffs for its reasonable attorneys' fees and other costs incurred in defending this lawsuit.

Respectfully submitted this 1st day of March, 1983.

BULLIVANT, WRIGHT, LEEDY, JOHNSON,
PENDERGRASS & HOFFMAN

By_____

Ronald E. Bailey

By_____
James G. Driscoll

Attorneys for Defendant

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife,	)	Civil No. 82-481
Plaintiffs,	)	AFFIDAVIT OF EARNEST A. SCHMIDT
v.	)	
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

STATE OF OREGON)
) ss.
County of _____)

I, EARNEST A. SCHMIDT, being first duly sworn, do depose and say:

1. I am the administrator of the solid Waste Division of the Oregon Department of Environmental Quality and a custodian of the records of that division. I am responsible for supervising the state-wide regulatory program for solid waste disposal sites. I am also responsible for implementing the federal Resource Conservation and Recovery Act program in Oregon. As such, I would normally be aware of any litigation concerning violations of the RCRA criteria by any DEQ permitted disposal site.

2. I have been asked by Mr. James G. Driscoll, attorney at law, whether or not this department has ever received a notice from Kim T. Buckley, dated April 16, 1981, or any other formal notice regarding the intent of Mr. and Mrs. Olaf Hallstrom to file suit against the Tillamook County Landfill under the provisions of RCRA. I have no recollection of ever having received such notice. Furthermore, I have had my staff search our files, and we find no evidence that any such notice was ever received.

DATED this ___ day of February, 1983.

_____
Earnest A. Schmidt

(Jurat omitted in printing)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Region 10
1200 Sixth Avenue
Seattle, Washington

CERTIFICATION OF ABSENCE OF
ENTRY AND ABSENCE OF RECORD

For purposes of Federal Rules of Evidence 803(7), 803(24), I hereby certify in my official capacity that I have made a diligent search of the relevant record retention depositories of this Agency, and the said search failed to disclose any entries, records, reports, statements or data compilations coming within the following description:

Notice of Intent to File Suit pursuant to 42 U.S.C. §6972 re
Tillamook County Landfill (Plaintiff Hallstrom).

Certifying Employee: /s/ Michael Garcia
(Title): Assistant Regional Counsel

(Jurat omitted in printing)

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	Civil No. 82-481 AFFIDAVIT OF JAMES G. DRISCOLL

STATE OF OREGON)
) ss.
County of Multnomah)

I, JAMES G. DRISCOLL, being first duly sworn, do depose and say:

I am an attorney engaged in the private practice of law in Portland, Oregon with the firm of Bullivant, Wright, Leedy, Johnson, Pendergrass and Hoffman. I am one of the attorneys representing the defendant Tillamoook County in this litigation.

On January 14, 1983 I wrote Mr. James Moore, Regional Counsel, Environmental Protection Agency in Seattle, Washington to inquire whether his agency had

ever received formal written notice from the plaintiffs or their attorneys of their intention to file under the provisions of the Solid Waste Disposal Act against Tillamook County for the operation of its landfill.

I was advised by Assistant Regional Counsel, Mr. Michael Garcia, that a search of their records, both in Seattle at the regional headquarters and also in the central administrative offices in Washington, D.C., failed to reveal any notice nor anyone who could recall having seen such a notice.

I thereafter received from EPA a Certificate of Absence of Entry and Absence of Record which I attach to this affidavit.

DATED this ___ day of March, 1983.

James G. Driscoll

(Jurat omitted in printing)

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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs,	)	Civil No. 82-481
v.	)	MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	

I
INTRODUCTION

Defendant's Motion for Summary Judgment should be denied because any failure to give formal notification to the D.E.Q. and the E.P.A. has been cured, the D.E.Q. and the E.P.A. received actual notice more than 60 days ago, defendant has not been prejudiced, and the purpose of the notice requirements of 42 U.S.C. §§ 6901-87 (Resource Conservation and Recovery Act of 1976) ("RCRA") has been accomplished.

Plaintiffs' live on farmland and tidelands adjacent to the Tillamook County Landfill, which is owned and operated by defendant. In April 1981, plaintiffs sent to

defendant written notice of several violations of RCRA and of plaintiffs' intention to file a citizen's suit under RCRA. Plaintiffs were particularly concerned about surface water and ground water pollution by leachate produced at the site. A copy of the notice is attached as Exhibit A. Copies of the notice were not sent to the D.E.Q. and the E.P.A.

After receiving the notice, defendant made some changes at the site, but the changes were inadequate and did not correct the RCRA violations set forth in plaintiffs' notice. Consequently, plaintiffs' filed this action on April 9, 1982. Depositions have been taken and all requested documents have been produced and inspected.

Despite the lack of formal notice in its files, the D.E.Q. knew that this case had been filed and the substance of plaintiffs' complaints at least as early as June 1982. *See* Interoffice Memo attached to Robert L. Brown's affidavit. The supervisor of the Solid Waste Section of the D.E.Q. knew about this case in December 1982. Robert L. Brown's affidavit at 1-2.

Despite the lack of formal notice in its file, the E.P.A. knew that this case had been filed at least since January 1983, when defendant asked the E.P.A. to search its records for any notices of "intention to file under provisions of the Solid Waste Disposal Act against Tillamook County for the operation of its landfill." *See* James G. Driscoll's affidavit ttached as Exhibit B to defendant's Motion for Summary Judgment.

On March 2, 1983, plaintiffs mailed copies of the April 1981 notice to the E.P.A. (Washington, D.C. and Region 10) and the D.E.Q. together with a notice of this

motion and of plaintiffs' intent to refile this case if necessary. A copy of this notice and the return receipts are attached as Exhibit B.

II

ARGUMENT

A. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE RCRA'S NOTICE REQUIREMENTS SHOULD BE INTERPRETED PRAGMATICALLY.

The Ninth Circuit has not decided what significance should be given the failure of a citizen to give notice of a citizen's suit to the E.P.A. when the E.P.A. is not named as a defendant. The Third Circuit, however, has interpreted identical citizen suit provisions in the Federal Water Pollution Control Act ("FWPCA") to require a pragmatic approach.

In *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reaction*, 619 F.2d 231 (3rd. Cir. 1980) *cert. denied* 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed2d 824 (1981), plaintiffs sought relief pursuant to the FWPCA, among other theories. Statutory notices were given the E.P.A. and the N.R.C. two days prior to the filing of the lawsuit. The court ruled that "to require dismissal and refiling of premature suits would be excessively formalistic." *Id.* at 243. In that case, the agencies involved had actual notice of the FWPCA violations, and had acted on plaintiff's claim prior to the trial court's disposition of the complaint.

In *Pymatuning Water Shed Citizens for a Hygenic Environment v. Eaton*, 644 F.2d 995 (3rd. Cir. 1981), the Third

Circuit reiterated this rule. In this case, when the defendants moved to dismiss the case for failure to give the statutory notices, the trial court denied the motion, but stayed proceedings until the notices were given. Affirming the trial court's action, the Third Circuit said that . . . "appellant's argument, [that the notice requirement is jurisdictional] . . . if adopted, would frustrate citizen enforcement of the Act . . . [and] . . . be a waste of judicial resources." The court held:

> "Here the district court stayed its proceedings until notice was given to the proper persons and entities. This stay allowed them the time contemplated by the statute for taking appropriate action. Eleven months elapsed before the court began hearing evidence in the case. The district court did not err in exercising its jurisdiction. *Id* at 996-97.

In this case, all the proper entities have had actual notice of this suit for more than 60 days prior to this hearing. The statutory notices were sent to the required agencies March 2, 1983. It would be unduly formalistic to grant defendants' motion and require plaintiffs to refile this lawsuit in May 1983.

A similar rule has been adopted in this district, though under somewhat different circumstances. *Stin v. City of Eugene*, Case No. 80-41 (April 29, 1980) (copy attached). *Stin* is an employment discrimination suit under Title VIII, 42 U.S.C. § 2000e, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). Title VII has a statutorily mandated jurisdictional exhaustion requirement which, though different in form from 42 U.S.C. § 6972 and 33 U.S.C. § 1365, has a similar effect. The claimant must receive a "right to sue letter" from the appropriate agency before initiating

legal action against the offender. 42 U.S.C. 2000e-5(f)(1). The claimant had not received that letter when the action was filed, thought she received it soon thereafter. Judge Juba held that plaintiff's subsequent receipt of the letter effectively complied with the statutory requirements. *Eldridge v. Carpenter* 46 440 F.Supp. 506, 517 (N.D. Cal. 1977). He pointed out that recognizing the subsequently issued letter was both judicially efficient and did not offend any major statutory policies. *Budreck v. Crocker National Bank* 407 F.Supp. 635, 646-47 (N.D. Cal., 1976).

Thus the court took a pragmatic view of that "jurisdictional requirement" similar to the one plaintiffs argue here.

B. THE PURPOSE OF THE NOTICE REQUIREMENT HAS BEEN SERVED.

The overall purpose of the RCRA is to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal and hazardous wastes." [1976] U.S. Code Cong. & Admin. News 6238, 6241. "The existing methods of land disposal often result in pollution, subsurface leachate and surface run-off, which affect air and water quality." *Id.* at 6242. As noted above, plaintiffs' primary concerns are the pollution of surface water and ground water the landfill is causing.

The legislative history of RCRA says little about the purpose of the citizen suit provisions. However, the Federal Water Pollution Control Act, which contains identical citizen suit provisions, sheds more light on their purpose and upon whether or not they were to be seen as jurisdictional.

The purpose of the citizen suit provisions if to "provide for citizen participation in the enforcement of . . . this Act." [1972] U.S. Code Cong. & Admin. News 3668, 3745. The purpose of the notice provisions is to " . . . encourage and provide for agency enforcement" of the Act. *Id.* The waiting period "should give the administrative enforcement office an opportunity to act on the alleged violation." *Id.* Thus, the only purpose behind the sixty day warning period is to give the E.P.A. and the D.E.Q. an opportunity to act against the alleged violation. This purpose is in no way offended if the agency gets notice after the lawsuit is actually filed, so long as the trial court has taken no action on the suit such as issuing an injunction, or temporary restraining order. This interpretation is reenforced by the Senate Conference Report, adopted in relevant part, which states

> "The bill requires that *no action on a suit may begin* for 60 days following notification to the alleged polluter. If the Administration or State begins a civil or criminal action on its own against an alleged polluter, *no court action could take place* on the citizen's suit. [1972] U.S. Code Cong. & Admin. News 3823 (emphasis added).

Thus, at least pursuant to the Senate version of the bill, it envisioned the filing of a complaint prior to the passage of 60 days, so long as no Court action was taken before the 60 day period ended.

C. THIS COURT SHOULD NOT RELY UPON THE CASES CITED BY DEFENDANT.

In *Middlesex County Sewage Authority v. Sea Clammers*, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65 (1980), the Court was never asked to address the question whether the

notice requirement of 42 U.S.C. § 6972 is jurisdictional. The language defendant quotes is from the Court's repetition, in their statement of fact, of the holdings of the trial court; it is not the holding of the Supreme Court. The Court said:

> In holdings relevant here, the District Court rejected respondents' nuisance claim under federal common law, see *Illinois v. Milwaukee*, 406 U.S. 91 (1972), on the ground that such a cause of action is not available to private parties. With respect to the claims based on alleged violations of the FWPCA, the court noted that respondents had failed to comply with the 60-day notice requirement of the "citizen suit" provision in § 505(b)(1)(A) of the Act, 86 Stat. 888, 33 U.S.C. § 1365(b)(1)(A). This provision allows suits under the Act by private citizens, but authorizes only prospective relief, and the citizen plaintiffs first must give notice to the EPA, the State, and any alleged violator. Ibid. Because respondents did not give the requisite notice, the court refused to allow them to proceed with a claim under the Act independent of the citizen-suit provision and based on the general jurisdictional grant in 28 U.S.C. § 1331. The court applied the same analysis to respondents' claims under the MPRSA, which contains similar citizen-suit and notice provisions. 33 U.S.C. § 1415(g). Finally, the court rejected a possible claim of maritime tort, both because they had failed to comply with the procedural requirements of the federal and state Tort Claims Acts. 435 U.S. at 6-8.

The primary question the Court addressed was whether the Third Circuit had been correct in finding an implied right of action under the FWPCA, in addition to the citizen suits provided for in 33 U.S.C. § 1365.

> We granted these petitions, limiting review to three questions: (i) *whether FWPCA and MPRSA imply a private right of action independent of their citizenship provision*, (ii) whether all federal common-law nuisance actions concerning ocean pollution now are pre-empted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance. We hold that there is no implied right of action under these statutes and that the federal common law of nuisance has been fully pre-empted in the area of ocean pollution. (emphasis added) *Id.* at 10-11.

The Supreme Sourt over-ruled the Third Circuit on the question of the implied cause of action.

The history of the *Sea Clammers* case is germane here, even though its holding does not apply. The Third Circuit opinion, reported at 616 F.2d 1222 (1980), pre-dates *Susquehanna* and *Pymatuning*. In *Sea Clammers*, the Third Circuit affirmed the district court's ruling that the notice requirement was jurisdictional. However, in dicta, the court discussed this "pragmatic approach" it later adopted, choosing not to rule upon it because of its view that there existed an implied cause of action under the FWPCA. 616 F.2d at 1226.

In *Susquehanna*, while *Sea Clammers* was pending before the Supreme Court, the Third Circuit adopted the pragmatic approach to the notice requirement and, as an alternative ground, found plaintiff's had an implied right of action under FWPCA, 619 F.2d at 243. In *Pymatuning*, while *Sea Clammers* was still pending, the Third Circuit explicitly based their decision only upon their pragmatic interpretation of 33 U.S.C. § 1365. 644 F.2d at 996 n.2. Thus while the Supreme Court reiterated the trial court's holding in its opinion, the Third Circuit adopted the pragmatic approach that over-ruled the trial court holding.

McCastle v. Rollins Environmental Services, 514 F.Supp. 936 (M.D.La., 1981), relied upon by defendant, is factually bizarre. There, plaintiffs sued defendant in state court and defendants sought removal to federal court. The trial court addressed the notice issue in this context: Defendants were arguing that plaintiffs had unintentionally pleaded a cause of action under RCRA, thus the federal court had jurisdiction over the matter. It was in this context that the court held the plaintiff had not brought an action under the RCRA, because they had filed no notices. It should be noted that the *McCastle* court relied upon the Third Circuit's decision in the *Sea Clammers* case, an opinion that has been superceded by the *Susquehanna* and the *Pymatuning* cases.

CONCLUSION

This Court should take a pragmatic view of the notice requirements of 42 U.S.C. § 6972. All relevant parties have had actual notice of the pendency of this case for more than 60 days. If the Court finds that insufficient, plaintiffs respectfully request a one month stay of any proceeding to cure any formal failure to give the E.P.A. and the D.E.Q. notice. Such an approach would conserve judicial resources, satisfy the policies behind the Act, and not unduly delay plaintiffs' day in court.

DATED this 22nd day of March, 1983.

Respectfully submitted,
ESLER & SCHNEIDER
By /s/ Robert A. DeGrath
Robert A. DeGrath, No. 78176
Of Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

Michael J. Esler
Kim T. Buckley
ESLER & SCHNEIDER
519 S.W. Park Avenue
Suite 510
Portland, Oregon 97204
(503) 223-1510

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs,	)	Civil No. 82-481
v.	)	AFFIDAVIT OF ROBERT L. BROWN
TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	
STATE OF OREGON	)	
	)	ss.
County of Multnomah	)	

I, ROBERT L. BROWN, on oath say:

1. I am Supervisor of the Solid Waste Section of the Solid Waste Division of the Oregon Department of Environmental Quality and a custodian of the records of that section. I am responsible for supervising the state-wide regulatory program for solid waste disposal sites that do

not involve the disposal of hazardous waste. The Tillamook County Landfill falls within my jurisdiction.

2. I first became aware that this lawsuit was pending in December 1982.

3. Attached to this affidavit is a copy of an Interoffice Memo dated June 29, 1982, taken from DEQ's files. Tim Spencer is an employee of the Oregon Department of Environmental Quality under my supervision.

/s/Robert L. Brown
Robert L. Brown

(Jurat omitted in printing)

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY — *INTEROFFICE MEMO*

TO: Tom Bispham, NW Region — DATE: June 29, 1982

FROM: Tim Spencer, SW

SUBJECT: Tillamook Landfill – Monitoring Wells

On May 19, 1982, Greg Pettit (DEQ Laboratory staff) and I visited the Tillamook Landfill for a routine water quality sampling run. Sampling efforts were hampered, however, because two of the monitoring wells are damaged:

(1) Well no. 3 (the upgradient well) – The casing is bent because of landsliding. We were able to sample well no. 3 but could not bail it. Consequently, our most recent sample results and future samples may not be representative of actual water quality conditions in the groundwater system at this location.

(2) Well no. 1 – the shallow well casing is obstructed. We were unable to bail or sample this well.

Recommendations

I recommend that we pressure the county to repair or replace the monitoring wells quickly. Overall, the county has done a poor job of maintaining the monitoring wells (see past correspondence in file). Prompt action is especially important in light of the ongoing leachate problems at the site and the legal action that has been initiated against the landfill by a local resident (Mr. Hallstrom vs. Tillamook County). Mr. Hallstrom has retained a consulting geologist to investigate the landfill.

I will follow this up with a more detailed memo describing overall conditions at the landfill.

SC531
cc: John Smits, Astoria Office

EXHIBIT "A"

ESLER & SCHNEIDER
Attorneys at Law
610 S.W. Broadway, Suite 510
Portland, Oregon 97205
(503) 223-1510

April 16, 1981

Mr. Jerry Woodward
Tillamook County
Commissioner
Tillamook County Courthouse
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Re: Tillamook County Landfill – Notice of Intent to file Suit Pursuant to 42 U.S.C. § 6972

Dear Mr. Woodward:

This office represents Mr. and Mrs. Olaf Hallstrom. This letter is written to you pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254.

Please take notice that Mr. and Mrs. Hallstrom intend to file a citizen's suit in United States District Court for the District of Oregon against Tillamook County and its commissioners, administrators, and employees responsible for the Tillamook County landfill.

Since it became a solid waste disposal site, the Tillamook County Landfill has been and continues to be in violation of the following statute and regulations:

42 U.S.C. § 6945
40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
40 C.F.R. §§ 257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6. amd 257.3-7.
40 C.F.R. §§ 264.1-.77
40 C.F.R. §§ 265.1-.94 and 265.220-.315

The Tillamook County Landfill is being operated as an illegal open dump. From time to time, hazardous wastes have been disposed of on the site. Water discharged from the site is contaminated with dangerously high concentrations of hazardous waste and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards. Conditions are maintained at the site which are favorable for the harboring, feeding, and breeding of vectors. The surface area of the exposed solid waste has not been minimized, cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to treat the leachate produced at the site have been grossly inadequate. The leachate produced at the site has been allowed to drain onto the Hallstrom's land and the tidewater areas adjacent to the site.

Tillamook County is the owner of the Tillamook County Landfill, and it is responsible for these violations.

Mr. and Mrs. Hallstrom's address and telephone number are

1350 Hallstrom Road
Tillamook, Oregon 97141
(503) 842-6962

As noted above, they have retained this office to represent them in this matter. Accordingly, please direct all inquiries and responses to Michael Esler or Kim Buckley of this office.

Very truly yours,
/s/ Kim T. Buckley
Kim T. Buckley

KTB:meg
cc: Mr. and Mrs. Olaf Hallstrom

(Post Office Return Receipts from Tillamook County omitted in printing)

EXHIBIT "B"

ESLER & SCHNEIDER
Attorneys at Law
510 Park Washington Building
519 S.W. Park Avenue
Portland, Oregon 97205

March 2, 1983

Kim T. Buckley 503-223-1510

Solid Waste Administrator
Tillamook County Courthouse
201 Laurel Avenue
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Administrator
Environmental Protection Agency
Washington, D.C. 20460

Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington

Mr. Ernest A. Schmidt
Administrator, Solid Waste Division
Department of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

Re: *Hallstrom v. Tillamook County*, United States District Court, District of Oregon, Civil No. 82-481
Tillamook County Landfill – Notice of Pending Litigation and Intent to File Suit Pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254

Gentlemen:

Here is a copy of a letter I sent to Tillamook County on April 16, 1981, advising the county that I intended to file a citizen's suit pursuant to 42 U.S.C. § 6972. Copies of the notice were not mailed to you as a result of inadvertence. A citizen's suit was filed more than 60 days after the enclosed notice was sent to Tillamook County.

Tillamook County has filed a motion requesting judgment in its favor because the enclosed notice was not sent to you. I intend to ask the court to stay the case for 60 days to satisfy any objection Tillamook County might have to any failure of notice. If the court allows Tillamook County's motion for summary judgment, I will refile this case upon expiration of the 60-day period and seek an expedited trial date.

The conditions and violations described in the enclosed notice continue to exist despite efforts by Tillamook County since April 16, 1981.

Very truly yours,

ESLER & SCHNEIDER

By: /s/ Kim T. Buckley
Kim T. Buckley
Of Attorneys for Olof A. and Mary Hallstrom

KTB:meg
cc: Atorney General of the United States
Mr. and Mrs. Olof Hallstrom
Mr. James G. Driscoll
Enclosure

ESLER & SCHNEIDER
Attorneys at Law
610 S.W. Broadway, Suite 510
Portland, Oregon 97205
(503) 223-1510

April 16, 1981

Mr. Jerry Woodward
Tillamook County
Commissioner
Tillamook County Courthouse
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

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40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
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40 C.F.R. §§ 265.1-.94 and 265.220-.315

The Tillamook County Landfill is being operated as an illegal open dump. From time to time, hazardous wastes have been disposed of on the site. Water discharged from the site is contaminated with dangerously high concentrations of hazardous waste and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards. Conditions are maintained at the site which are favorable for the harboring, feeding, and breeding of vectors. The surface area of the exposed solid waste has not beene minimized, cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to treat the leachate produced at the site have been grossly inadequate. The leachate produced at the site has been allowed to drain onto the Hallstrom's land and the tidewater areas adjacent to the site.

Tillamook County is the owner of the Tillamook County Landfill, andit is responsible for these violations.

Mr. and Mrs. Hallstrom's address and telephone number are

1350 Hallstrom Road
Tillamook, Oregon 97141
(503) 842-6962

As noted above, they have retained this office to represent them in this matter. Accordingly, please direct all inquiries and responses to Michael Esler or Kim Buckley of this office.

Very truly yours,

/s/ Kim T. Buckley
Kim T. Buckley

KTB:meg
cc; Mr. and Mrs. Olaf Hallstrom

(Post Office Return Receipts from the EPA, Tillamook County, DEQ, Regional Administrator of EPA omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KAREN STEIN, Plaintiff, v. CITY OF EUGENE, CHARLES T. HENRY, individually and in his capacity as City Manager, City of Eugene, and GARY LONG, individually and in his capacity as Personnel Director City of Eugene, Defendants.	Civil No. 80-41 FINDINGS AND RECOMMENDATION AND ORDER (Filed April 29, 1980)

Plaintiff alleges that her former employer, the City of Eugene (City), discriminated against her on the basis of her sex in violation of Title VII, 42 U.S.C. § 2000e, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

The City now moves the court for an order designating Eugene as the place where all pre- and post-trial matters will be heard and as the place of trial. In her

affidavit, the City's attorney states that the events underlying this action occurred in Eugene, all defendants, witnesses, and all records are located in Eugene, and defendants' attorneys are located in Eugene. She states that the only person connected with this action who is located in Portland is plaintiff's co-counsel, Clinton Lonergan. (Plaintiff's counsel, Mr. Oler, is located in San Francisco.) Defendant's motion is unopposed.

Pursuant to Local Rule 2, Eugene may be designated as the place of trial for actions arising in Lane County. The City's motion for all pretrial and post-trial proceedings, and for trial in Eugene is granted.

The City also moves to dismiss plaintiff's Title VII claim for lack of subject matter jurisdiction. The City contends that plaintiff failed to obtain a "Notice of Right to Sue" letter before filing this action, as required by 42 U.S.C. § 2000e-5(f)(1). In paragraph 7 of her complaint, plaintiff alleges that she has "duly requested a 'Notice of Right to Sue' letter and accordingly awaits receipt of same." Plaintiff contends this jurisdictional prerequisite has been cured. On January 25, 1980, eleven days after this action was filed, plaintiff was sent a "Notice of Right to Sue" Letter. (See Exhibit A to Declaration of Curtis G. Oler.)

Courts within the Ninth Circuit have recognized that "subsequent receipt of a right-to-sue letter can cure the jurisdiction in a suit initially filed without one." *Eldredge v. Carpenters 46*, 440 F.Supp. 506, 517 (N.D. Cal. 1977); *Budreck v. Crocker National Bank*. 407 F.Supp. 635, 646-647 (N.D. Cal. 1976). *See also, Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 (9th Cir, 1975), *vacated on*

other grounds 434 U.S. 158 (1977). Although a right-to-sue letter is considered to be a jurisdictional prerequisite to filing a Title VII action, "recognition of a subsequently issued letter is judicially efficient and does not offend any major statutory policies." *Budreck, supra,* 407 F.Supp. at 646. Since plaintiff obtained a right-to-sue letter very shortly after she filed her complaint, she has effectively complied with the requirements of 42 U.S.C. § 2000e-5(f)(1).

Defendant's motion to dismiss plaintiff's Title VII claim for lack of subject matter jurisdiction should be denied.

Dated this 29 day of April, 1980.

/s/ George E. Juba
United States Magistrate

Ronald E. Bailey
James G. Driscoll
BULLIVANT, WRIGHT, LEEDY, JOHNSON,
PENDERGRASS & HOFFMAN
1000 Willamette Center
121 S.W. Salmon Street
Portland, Oregon 97204
Telephone: (503) 228-6351

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife,	)	Civil No. 82-481
Plaintiffs,	)	REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
v.	)	
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

I

INTRODUCTION

In their Memorandum in Opposition to the defendant's Motion for Summary Judgment, the plaintiffs advance two arguments why this Court should ignore the plain language of the statute and allow the plaintiffs to proceed, despite the admitted failure to comply with the notice requirements of the Solid Waste Disposal Act (SWDA) (42 USC § 6901-6987).

The plaintiffs first argue that there has been actual notice and substantial compliance with the notice requirement sufficient to accomplish its purposes. For their

second argument, the plaintiffs cite two decisions from the Third Circuit Court of Appeals, for the proposition that notice is neither jurisdictional nor a prerequisite as a matter of law: *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reaction*, 619 F2d 231 (3rd Cir. 1980) cert. denied, 449 US 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981) and *Pymatuning Watershed Citizens For A Hygenic Enviroment v. Eaton*, 644 F2d 995 (3rd Cir. 1981).

Plaintiffs' first argument is effectively refuted by the statement of facts set forth in its own Memorandum. Plaintiffs' second argument, to the extent that it ever existed under the *Susquehanna* and *Pymatuning* decisions, has been expressly rejected by the United States Supreme Court in the case of *Middlesex Co. Sewerage Authority v. Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981).

II

PURPOSE OF THE NOTICE REQUIREMENT

The plaintiffs' Memorandum discusses the purpose behind the federal pollution control legislation, including RCRA, and also the purpose behind the citizens' suit provisions in those Acts. However, the Memorandum is notably silent as to the purpose *of the notice requirement*.

That question was, however, addressed in the case of *So.Car. Wildlife Federation v. Alexander*, 457 F.Supp. 118 (D.SC 1978). That case involved an effort to stop the construction and potential operation of one dam and the continuing operation of two existing dams on the grounds that the dams would constitute sources of pollution in violation of the Federal Water Pollution Control

Act (FWRCA). However, the plaintiffs' prior notice of their claim mentioned only the one dam that had not yet been constructed. With respect to any claim concerning either of the other two, already existing dams, the Court held that the failure to mention them in the notice of claim defeated the purpose of the notice requirement and therefore barred any claims with respect to those two dams. The Court stated:

> " . . . The omission of Clark Hill and Hartwell as sources of violations would not provide defendants with notice sufficient to allow possible administrative resolution of the claims as to those projects. Plaintiffs' argument that defendants have not been prejudiced by these omissions because the filing of the suit in this court gave them actual notice simply begs the question. One of the major purposes of the notice provision is to allow for possible administrative resolution *prior* to filing suit. Since the notice is jurisdictional such a significant omission divests this court of the authority to further proceed with an adjudication of this matter as it relates to Hartwell and Clark Hill. . . . " (457 F.Supp. at 124) (Orig. emphasis).

If the purpose of the notice provision is to allow for possible administrative resolution of the plaintiffs' claims prior to the filing of a lawsuit, that purpose has clearly not been accomplished in the present case. Although the plaintiffs filed their suit in April 1982, the Department of Enviromental [sic] Quality (DEQ) did not learn of the claim until December 1982, and the Enviromental [sic] Protection Agency (EPA) did not learn of it until January, 1983. See the Affidavits of Ernest A. Schmidt and James G. Driscoll and attached Certificate of Absence of Entry and Absence of Record of EPA, attached to defendant's Motion for Summary Judgment. See also the Affidavit of

Robert L. Brown and the Statement of Facts set forth in the Introduction in the plaintiffs' Memorandum in Opposition.

The plaintiffs suggest that the Department of Eviromental [sic] Quality may have had actual knowledge of this lawsuit as early as June 29, 1982, based upon an inter-office memo from the files of DEQ. In the first place, it is apparent from the Affidavits of Mr. Schmidt and Mr. Brown that any knowledge of this litigation did not reach to the level of any person in authority within the agency. Mr. Schmidt identifies himself in his Affidavit as the Administrator of the Solid Waste Division of DEQ, responsible for supervising solid waste disposal sites and for implementing RCRA in Oregon. Mr. Brown identifies himself in his Affidavit as the Supervisor of the Solid Waste Section of the Solid Waste Division of DEQ and responsible for supervising solid waste disposal sites that do not involve hazardous waste, including the Tillamook County landfill. Both Affidavits establish that neither of these individuals had any actual notice or knowledge of this litigation until December 1982.

Moreover, it is doubtful that the inter-office memo even refers to this litigation. The plaintiffs have previously filed a lawsuit in Tillamook County Circuit Court alleging claims of trespass and nuisance against Tillamook County for the operation of the sanitary landfill. That action was voluntarily dismissed by the plaintiffs shortly before filing the present proceeding in Federal Court. That lawsuit did not involve any claims of violations of any federal standards, and therefore would not have served as notice, actual or constructive, of any claims under RCRA. Given the lack of any action on the

part of DFQ from June to December 1982, it appears much more likely that the reference in the inter-office memo is to the earlier, state court, litigation. Knowledge of that litigation would not constitute notice, either actual or constructive, of the present claims.

Plaintiffs concede that neither EPA nor DEQ had any notice or knowledge of this lawsuit prior to the time it was filed, and it appears from the record that neither agency had either notice or knowledge of these claims for nine to ten months thereafter. Moreover, plaintiffs concede they only gave notice to these agencies within the last 30 days. Under these circumstances, it is apparent that the plaintiffs have not "substantially complied" with the statutory requirement that they give notice of the claimed violations of the federal standards to these two agencies at least 60 days *prior* to commencing litigation.

Moreover, it is equally apparent that the purposes of the notice requirement have not been served. Neither EPA nor DEQ have had an opportunity to consider the plaintiffs' claims and address them through available administrative procedures, thereby perhaps resolving quickly and efficiently whatever problems may exist without imposing upon the defendant the burden and expense of this litigation.

III

LEGAL SUFFICIENCY OF NOTICE

No case cited by the plaintiffs supports the exercise of subject matter jurisdiction by this Court under the present circumstances, and the arguments and authorities cited by the plaintiffs have been rejected by the United States Supreme Court.

Defendants agree that prior court decisions have found legally sufficient notice where the agency in question had actual knowledge of the plaintiffs' claims more than 60 days prior to the filing of the lawsuit, although there may have been lack of any formal notice to the agency. See, e.g., *Save Our Sound Fisheries Assn. v. Callaway,* 429 F.Supp. 1136 (D.RI 1977). Other federal courts have found jurisdiction for these types of citizens' suits despite lack of the 60-day prior notice either by implying a private right of action under the statutes but separate from the express citizen suit provisions (*Nat'l. Sea Clammers Assn. v. City of New York,* 616 F2d 1222 (3rd. Cir. 1980)), while others have characterized these claims as federal common law nuisance claims and found jurisdiction under the general federal question jurisdiction of 28 USC 1331 (*Twp. of Long Beach v. City of New York,* 445 F.Supp. 1203 (D.NJ 1978). Finally, some courts have found substantial compliance where the agency had actually received notice of the claims prior to the filing of the lawsuit and had in fact reviewed the matter and made an agency determination prior to any action by the federal court (*Susquehanna Valley Alliance v. Three Mile Island, supra*). This elastic approach to jurisdiction has been

expressly repudiated by the Supreme Court in the *Middlesex Co. Sewerage Authority* case.

The plaintiffs seek to limit the holding in *Middlesex* by ignoring the actual decision of the Court. In that case, the Supreme Court considered the jurisdictional basis for claims for water pollution brought by private citizens. The Court quoted *with approval* the district court decision that the plaintiffs could not proceed under the citizens' suit provisions of either FWPCA or the Marine Protection, Research, and Sanctuaries Act (MPRSA) *because the plaintiffs had failed to give 60 days prior notice as required by those Acts!* (453 US at 6-7).

The Court then went on to hold that there was no implied right of action under those statutes which would permit an action *absent* compliance with the notice requirement (453 US at 11). The Court also held that Congress intended these statutes to preempt the area of water pollution, and therefore there was no right of action under either federal common law or under 28 USC § 1983.

Contrary to the plaintiffs' assertion, the Supreme Court in *Middlesex* directly addressed the notice requirement as a jurisdictional prerequisite. In discussing the citizens' suit provisions of FWPCA and MPRSA, the Court stated:

> ". . . These citizen suits provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures – which respondents here ignored – including in most cases 60 days prior notice to potential defendants." (453 US at 14).

After disposing of all alternative bases for jurisdiction, the Court concluded by expressly holding that the plaintiffs were barred from maintaining *any* claim because they had failed to comply with the notice requirement and no other basis for federal jurisdiction existed. The concluding paragraph of the Court's decision states:

> "We therefore must dismiss the federal common law claims because their underlying legal basis is now preempted by statute. *As discussed above, we also dismiss the claims under MPRSA and the FWPCA because respondents lack a right of action under those statutes.* We vacate the judgment below with respect to these two claims and remand for further proceedings." (453 US at 22).

The gist of the *Middlesex* Decision is that claims such as the present lawsuit may be brought only under the relevant regulatory statutes (in this case, RCRA) and only in strict compliance with the procedural requirements of those statutes. The Third Circuit's Decision in *Sea Clammers* was expressly overruled. Since the decisions cited by the plaintiffs, *Susquehanna* and *Pymatuning*, relied upon the Third Circuit's Decision in *Sea Clammers for their result, they too must fall. See the discussion in Susquehanna* at 619 F2d 243 and in *Pymatuning* at 644 F2d 996.

CONCLUSION

Plaintiffs concede that they have wholly failed to comply with the statutory notice requirement under RCRA. Neither DEQ nor EPA had notice or knowledge, actual or constructive, of the plaintiffs' claims at any time prior to the filing of this lawsuit, nor for nine to ten month thereafter. It is clear that the purpose of the notice

requirement has not been served, since there has been no opportunity for prior, and possibly dispositive, agency action on the plaintiffs' complaints. Moreover, it is apparent that the defendant has been prejudiced by the plaintiffs' failure in this regard. The defendant has been subjected to the burden and expense of having to defend this lawsuit, when the entire matter might have been resolved expeditiously by EPA and DEQ.

It is equally apparent that any problems resulting from any delay were invited by the plaintiffs. In their Complaint, the plaintiffs specifically allege that they had given notice "More than 60 days prior to the commencement of this action . . . pursuant to 42 USC § 6972 and 40 CFR § 254." (Complaint, p.3, Par.10, 11. 19-21). It is apparent from the face of the Complaint that the plaintiffs were aware from the outset of the existence of this requirement and simply declined to take the necessary steps to comply with it.

Plaintiffs fundamental problem is that they seek to ignore the plain language of the statute, as construed by the United States Supreme Court. Under the present circumstances, this Court simply lacks subject matter jurisdiction and the case must be dismissed.

Respectfully submitted this 1st day of April, 1983.

BULLIVANT, WRIGHT, LEEDY, JOHNSON
PENDERGRASS & HOFFMAN

By (SIGNED) RONALD E. BAILEY
Ronald E. Bailey

By (SIGNED) JAMES G. DRISCOLL
James G. Driscoll

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	CIVIL NO. 82-481 ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (MOTION TO DISMISS) (Filed April 22, 1983)

Defendant Tillamook County seeks dismissal of plaintiffs' complaint. The motion is framed as one for summary judgment under Fed. R. Civ. P. 56. However, it is more accurately characterized as one for dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant contends that plaintiffs have failed to strictly comply with the provisions of 42 U.S.C. § 6972 under which they claim subject matter jurisdiction. *See also* 40 C.F.R. § 254.2(a)(2).

Section 6972 of the Resource Conservation and Recovery Act of 1976 (RCRA) provides for sixty (60) days notice of intent to file suit to the Environmental Protection Agency (EPA), to the relevant State authorities, and to the alleged violator. *See* 42 U.S.C. § 6972(b)(1). Notification is required before individual enforcement action may proceed. *Id.* Tillamook claims that plaintiffs failed to notify either the EPA or the Oregon Department of Environmental Quality (DEQ), prior to the filing of this lawsuit. Because of this defect, Tillamook argues that plaintiffs lack jurisdiction over them as well.

The purpose of the notice requirement is to allow administrative agencies an opportunity to cure any alleged violations. *South Carolina Wildlife Federation v. Alexander,* 457 F.Supp. 118, 124 (D.S.C. 1978). Defendant Tillamook County received notice from plaintiffs of their intent to file suit in April, 1981. Since then, defendant has done nothing to correct any of the alleged violations. Tillamook has also actively participated in this action since its filing in April, 1982.

Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

To grant defendant's motion based on the notice provision would be a waste of judicial resources. *Pymatuning Water Shed Citizens v. Eaton,* 644 F.2d 995, 996 (3rd Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,* 619 F.2d 231 (3rd Cir. 1980), *cert. denied,* 449 U.S. 1096 (1981).

Defendant's motion to dismiss for lack of subject matter jurisdiction is hereby DENIED.

IT IS SO ORDERED.

DATED this 22 day of April, 1983.

/s/ Owen M. Panner
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, vs. TILLAMOOK COUNTY, a municipal body, Defendant.	)	Civil No. 82-481 PRETRIAL ORDER

The following proposed Pretrial Order is lodged with the court pursuant to L.R. 235-2.

1. *Nature Of Action.*

This is a suit brought under the provisions of 42 U.S.C. § 6972 [the Resources Conservation and Recovery Act of 1976 (RCRA), as amended], against defendant Tillamook County, the owner and operator of the Tillamook County Landfill.

Plaintiffs' Position

Plaintiffs allege that the Tillamook County Landfill is being operated in violation of the standards and requirements established under RCRA. Plaintiffs also assert pendent state law claims against defendant Tillamook County for common law nuisance and trespass and for inverse condemnation.

Plaintiffs seek injunctive relief restraining defendant from operating the Tillamook County Landfill until it has been brought into compliance with the Resource Conservation and Recovery Act and the regulations enacted thereunder, and plaintiffs seek damages for the alleged nuisance, trespass, and inverse condemnation.

Defendant's Position

Defendant contends it has operated the Landfill in compliance with the standards and regulations established under RCRA. Defendant denies there has been any trespass or nuisance or any inverse condemnation of plaintiffs' property from the operation of the Landfill.

Trial will be to a jury.

2. *Subject Matter Jurisdiction.*

The plaintiffs assert jurisdiction of this Court under 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 6972.

Jurisdiction of the nuisance, trespass, and inverse condemnation claims is asserted as arising out of a common nucleus of operative facts.

3. *Agreed Facts As To Which Relevance Is Not Disputed.*

Plaintiffs are Oregon residents who own and reside on a commercial dairy farm located adjacent to the Tillamook County Sanitary Landfill.

Tillamook County is a municipal body duly organized and existing under Oregon law with power of eminent domain.

Prior to 1949 Tillamook County established a County solid waste disposal site on an 80 acre parcel of forest land owned by the County and located approximately three miles south of the town of Tillamook. Since 1951 the plaintiffs have owned property adjacent to the County's land. At all times from 1951 to the present the plaintiffs have resided on their land, and, at all times from 1951 to 1979, the plaintiffs have operated a successful commercial dairy farm on their property. Since 1979 the plaintiffs have leased the dairy operation to a neighbor, who has continued to operate the dairy farm to the present time.

In 1975 Tillamook County began a study to identifv the best site in the County for a modern solid waste disposal facility. The study was completed in 1978. The existing County waste disposal sites located near the towns of Manzanita and Pacific City were closed and all solid waste disposal activities in the County were concentrated at the main County facility near the plaintiffs' property. Subsequent to 1978, the main County solid waste disposal facility was converted from an open burning dump to a landfill.

Since at least 1974 plaintiffs have repeatedly complained to Tillamook County about the operation of the

main solid waste disposal site and have claimed that contaminated water from the site has polluted their property. Since at least 1974 plaintiffs have repeatedly complained that the solid waste disposal site was causing contamination of the land and water surrounding the site.

In April 1979 plaintiffs sued Tillamook County in State Circuit Court for pollution of their property by the solid waste disposal site.

On April 20, 1981, plaintiffs gave Tillamook County written notice of the claims against the County asserted by them in this case. Plaintiffs filed this action against Tillamook County on April 9, 1982. On March 2, 1983, the plaintiffs gave written notice of their claims to EPA and DEQ.

4. *Agreed Facts As To Which Relevance Is Disputed.*

The permit to operate the landfill issued by DEQ in April, 1981 required daily compacting of all solid waste deposited at the site and weekly covering with at least six inches of compacted earth. This permit required the area of exposed solid waste not to exceed 50 feet by 100 feet. The permit required a leachate system that would not discharge any leachate off of the site or over the containment berm.

The solid waste disposal cells at the Tillamook County Landfill are not lined with an impermeable membrane.

The original solid waste containment cell was located over a natural spring.

5. *Contentions Of Fact.*

PLAINTIFFS'

1.) The Tillamook County Landfill is an illegal open dump.

2.) There are inadequate controls to prevent the disposal of hazardous wastes on the site. Solid waste disposed on the site is inspected for hazardous waste only cursorily, if at all. The site was not designed to handle hazardous waste.

3.) Surface water and leachate has been discharged from the Tillamook County Landfill onto plaintiffs' farmland and off the County's land on a regular basis. The groundwater under the site and plaintiffs' farmland is contaminated with dangerously high concentrations of hazardous wastes, dissolved solids, and chemicals. These concentrations exceed applicable water quality requirements.

4.) Emissions, including dust, from the Tillamook County Landfill violate applicable air quality requirements and adversely effect the quality of air around plaintiffs' residence and farmland.

5.) Conditions are maintained at the site that are favorable for the harboring, feeding, and breeding of vectors, particularly seagulls. These conditions violate applicable solid waste disposal site requirements.

6.) The surface area of exposed solid waste has not been minimized, contrary to DEQ Permit requirements and applicable solid waste disposal site requirements. Adequate and effective cover material has not been

applied, and the solid waste has not been compacted on a daily basis as required.

7.) The landfill was improperly designed, and the site was poorly chosen. The site geology is likely to cause groundwater contamination and surface water runoff.

8.) Measures taken to treat the leachate produced at the site have not been effective. The leachate distribution system was approved by DEQ on an experimental basis. It is an experiment that failed because leachate is discharged on a regular basis from the Tillamook County Landfill onto the surrounding land and tidelands.

9.) The leachate produced at the site has been allowed to drain onto plaintiffs' land, the tidewater areas adjacent to the site, and into Sutten Creek and the Tillamook River. The leachate discharged onto plaintiffs' land contained a gas and oil residue. The leachate distribution system designed by Tillamook County and Boatwright Engineering has been ineffective and inadequate.

10.) Leachate production at the Tillamook County Landfill has also resulted in the contamination of groundwater beneath plaintiffs' residence and farmland without the consent and contrary to the desire of plaintiffs. Since service of the notice of intent to sue, contamination of groundwater has substantially increased and the leachate system has failed.

11.) Defendant's conduct has unreasonably interfered and continues to interfere with plaintiffs' use and enjoyment of their residence and farmland.

12.) Defendant Tillamook County has failed and refused to control the continuing contamination of the

land surrounding the Tillamook County Landfill. Defendant Tillamook County has continued to operate the Tillamook County Landfill in violation of the DEQ Permit.

13.) Efforts to maintain the operation of the Tillamook County Landfill have been inadequate and poorly conceived.

14.) Defendant's conduct constitutes a taking of plaintiffs' land for public use without just compensation. The taking occurred after mid-1980 when plans were finalized to convert the burning dump to a Landfill.

15.) As a result of defendant's trespass, nuisance, and wrongful taking of plaintiffs' land, plaintiffs have been damaged by more than $210,000.00.

16.) More than 60 days before the commencement of this action, plaintiffs served a Notice of Intent to file a citizen suit pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254.

17.) Plaintiffs' property includes tidelands.

18.) Leachate produced at the Tillamook County Landfill has been discharged upon plaintiffs' real property without the consent and contrary to the desire of the plaintiffs.

19.) The blowing of debris (e.g., paper and plastic bags) has been a constant problem of the Tillamook County Landfill.

20.) Since 1979 the lessee of plaintiffs' dairy has kept the milk-producing portion of the herd on the far side of Beaver Creek away from the Landfill.

21.) The geologist hired by the County as part of the 1978 study wrote that the burning dump was probably not developable, but that 80 acres owned by the County nearby may warrant further consideration.

22.) The cost of converting the open burning dump to a Landfill was $193,770 plus engineering costs.

23.) From May 31, 1979, through April 22, 1979, Tillamook County operated its solid waste disposal facility without a DEQ permit.

24.) Since March 2, 1983, Tillamook County has not been instructed to do anything concerning the Landfill by DEQ or EPA.

25.) Except as admitted above, plaintiffs deny defendant's factual contentions.

DEFENDANT'S

1.) Since 1975 Tillamook County has at all times operated its solid waste disposal facility under a series of permits from the State of Oregon Department of Enviromental [sic] Quality (DEQ). No citations have ever been issued by DEQ against Tillamook County for this operation.

2.) Tillamook County has at all times operated the facility in question in compliance with a State plan for the elimination or amelioration of conditions which might otherwise constitute prohibited forms of waste disposal.

3.) Operation of the Tillamook County Sanitary Landfill has not violated the applicable standards and regulations established by the EPA under RCRA.

4.) Federal standards and regulations under RCRA for the construction and operation of solid waste disposal facilities were first promulgated by the Enviromental [sic] Protection Agency (EPA) on July 31, 1979. These regulations first became applicable to solid waste disposal facilities in the State of Oregon on June 22, 1982.

5.) Operation of the Tillamook County facility has not resulted in pollution of the land, surface water, ground water, or air in the vicinity of the landfill. In particular, operation of the landfill has not resulted in pollution or contamination of the plaintiffs' property or water flowing through or under plaintiffs' property.

6.) Tillamook County has not allowed disposal of hazardous waste materials as defined by EPA at its solid waste disposal facility except as allowed by special authorization of DEQ. Tillamook County maintains adequate procedures to inspect and prevent disposal of unauthorized hazardous waste at its disposal facility.

7.) The site of the Tillamook County Sanitary Landfill was properly chosen, the facility was properly designed and constructed, and the facility has been properly operated and maintained by Tillamook County at all times. Conversion of the open dump to a sanitary landfill after 1978 cost in excess of $1,000,000, and is ongoing to the present day.

8.) The operation of the sanitary landfill has not unreasonably interfered with plaintiffs' use and enjoyment of their property so as to effectively deprive them of substantially all beneficial use of that property.

9.) The operation of the sanitary landfill has not interfered with plaintiffs' use and enjoyment of their property so as to effectively deprive them of substantially all beneficial use of that property.

10.) Plaintiffs have been aware of the damages claimed in this proceeding and of the County's involvement in those claims for more than 180 days prior to their written notice of claim.

11.) Plaintiffs have been aware of the basis for their claims for trespass and nuisance and of the County's involvement in those matters for more than two years prior to the filing of this action.

12.) Plaintiffs have been aware of the basis for their claim for inverse condemnation and of the County's involvement in that matter for more than six years prior to the filing of this action.

13.) Except as admitted above, defendant denies plaintiffs' factual contentions.

6. *Contentions Of Law.*

PLAINTIFFS'

1.) Defendant Tillamook County owns and operates an illegal open dump, the Tillamook County Landfill, in Tillamook County, Oregon, in violation of the following statutes and regulations:

42 U.S.C. § 6945
40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1 [effective 1974]
40 C.F.R. §§ 257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6, and 257.3-7 [effective October 15, 1979]

40 C.F.R. §§ 264.1-.77 [effective November 9, 1980]
40 C.F.R. §§ 265.1-.94 and 265.220-.315. [effective November 9, 1980]
OAR Chapter 342, Divisions 61, 62, and 63.

2.) The "requirement" sections of 40 C.F.R. Part 241 delineate minimum levels of performance required of any solid waste land disposal site operation. The "criteria" of 40 C.F.R. Part 257 are for determining whether a solid waste disposal facility is an illegal open dump.

3.) Plaintiffs are entitled to injunctive relief requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.F.R. Parts 241 and 257, and §§ 264.50-.56, 264.110-.120, 265.50-.56, and 265.112-.118.

4.) Plaintiffs are entitled to injunctive relief restraining defendant Tillamook County or anyone from operating the Tillamook County Landfill until it has been brought in compliance with the Resource Conservation and Recovery Act and the above regulations.

5.) Under 42 U.S.C. § 6972, plaintiffs are entitled to recover the cost of this litigation, including reasonable attorney and expert witness fees.

6.) Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

7.) The discharge of leachate and the emission of dust and odors constitutes a nuisance and trespass of plaintiffs' real property by Tillamook County. Such nuisance and trespass is in violation of plaintiffs' right to exclusive possession.

8.) Plaintiffs are entitled to injunctive relief restraining defendant Tillamook County from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

9.) Defendant's conduct constitutes a taking of plaintiffs' land for public use without just compensation.

10.) Plaintiffs are entitled to recover $210,000.00, the damages they have sustained as a result of defendant's taking of their land, plus interest thereon at the legal rates from mid-1980, the date of taking.

11.) Plaintiffs are entitled to recover $210,000.00, the damages they sustained because of defendant's unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland and because of defendant's trespass upon plaintiffs' residence and farmland.

12.) Under ORS 20.085, plaintiffs are entitled to recover reasonable attorney fees incurred in this case for inverse condemnation.

13.) Defendant Tillamook County is required to operate its landfill in accordance with the regulations promulgated under the Resource Conservation and Recovery Act, 32 U.S.C. §§ 6901-87.

14.) The doctrine of sovereign immunity does not apply to defendant.

15.) The doctrine of sovereign immunity does not protect defendant Tillamook County from suits to enjoin defendant from operating the Tillamook County Landfill as a nuisance or a trespass.

16.) The doctrine of sovereign immunity does not protect defendant from suits for inverse condemnation.

17.) Plaintiffs have commenced this action within the time allowed by law. The claims stated in plaintiffs' Complaint are continuing torts.

18.) Plaintiffs have given defendant adequate notice of their claims as required by the Resource Conservation and Recovery Act and as required by Oregon law.

19.) Plaintiffs have stated claims for violations of the Resource Conservation and Recovery Act, for nuisance, for trespass, and for inverse condemnation.

20.) The doctrine of *res judicata* does not bar plaintiffs from prosecuting any of the claims alleged in plaintiffs' complaint against defendant Tillamook County.

21.) The doctrine of discretionary/mandatory functions does not protect defendant from liability to plaintiffs for damages caused by defendant's wrongful and illegal operation of the Tillamook County Landfill.

22.) Defendant has never possessed plaintiffs' property adversely, *i.e.* hostily, exclusively, under color of title or claim of right.

23.) Except as admitted above, plaintiffs deny defendant's legal contentions.

DEFENDANT'S

1.) Tillamook County's operation of the sanitary landfill in compliance with the schedule established by DEQ is an absolute defense to the plaintiffs' claims for alleged violation of the federal standards and regulations established under RCRA.

2.) By the terms of RCRA, no federal standards or regulations were applicable to solid waste disposal activities conducted in the State of Oregon prior to June 22, 1982, and, therefore, no violation of those standards was possible prior to that date.

3.) State solid waste disposal standards and regulations promulgated by Oregon DEQ are irrelevant to the plaintiffs' federal claims prior to their acceptance by EPA on June 22, 1982.

4.) The decisions concerning the location, design, construction, and management and operation of the Tillamook County Sanitary Landfill are discretionary functions for which Tillamook County is immune from liability.

5.) Plaintiffs' claims for nuisance and trespass are barred by plaintiffs' failure to give adequate and timely notice of these claims to Tillamook County as required by the Oregon Tort Claims Act.

6.) Plaintiffs' claims for nuisance, trespass and inverse condemnation are barred by plaintiffs' failure to commence this action within the applicable statutes of limitations.

7.) The State of Oregon has never waived sovereign immunity for suits for injunctions. Plaintiffs' claims for

injunctive relief for nuisance, trespass and inverse condemnation are barred by the doctrine of sovereign immunity.

8.) Plaintiffs failed to give written notice of their claims for violation of the federal standards and regulations to either DEQ or EPA at least 60 days prior to commencing this action. This court therefore lacks subject matter jurisdiction of the plaintiffs' claims.

9.) Tillamook County's operation of the Landfill has not unreasonably interfered with the plaintiffs' use and enjoyment of their property.

10.) Tillamook County's operation of the landfill has not so substantially interfered with the plaintiffs' use and enjoyment of their property as to constitute inverse condemnation.

11.) Many of the plaintiffs' claims do not constitute violations of RCRA, nor do they constitute common law nuisance or trespass, nor inverse condemnation.

12.) The plaintiffs did or could have litigated the present claim to a final conclusion in their prior State Court proceeding against Tillamook County in 1979. The plaintiffs' claims are therefore barred as *res judicata*.

13.) The defendant is entitled to recover from the plaintiffs the cost of this litigation, including reasonable attorneys fees and expert witness fees.

14.) Except as admitted above, defendant denies plaintiffs' legal contentions.

7. *Amendments To Pleadings.*

Plaintiffs want to amend their Complaint by interlineation by inserting "17" in line 20 on page 5 of plaintiffs' Complaint, and to allege violations of OAR Chapter 340, Divisions 61, 62, and 63. Defendant does not object to the first proposed amendment, but does object to the second proposed amendment.

ESLER & SCHNEIDER

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Kim T. Buckley
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BULLIVANT, WRIGHT, LEEDY, JOHNSON, PENDERGRASS & HOFFMAN

By /s/ Ronald E. Bailey
Ronald E. Bailey

By: /s/ James G. Driscoll
James G. Driscoll
Attorneys for Defendant

IT IS ORDERED the foregoing Pretrial Order is
___ Approved as lodged.
___ Approved as amended by interlineation.
DATED this ___ day of ___, 1983.

United States District Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife,	)	
Plaintiffs,	)	Civil No. 82-481JU
v.	)	OPINION AND ORDER
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

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Of Attorneys for Defendant

JUBA, Magistrate:

I. *BACKGROUND*

This is a suit brought under the provisions of the Resources Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq*. Plaintiffs own and reside on a commercial dairy farm located adjacent to a sanitary landfill owned and operated by defendant, Tillamook County. Plaintiffs maintain that the Tillamook County landfill is being operated in violation of the standards

and requirements established under RCRA. Plaintiffs have also made pendent state claims against defendant for common law nuisance, trespass and inverse condemnation.

Trial of this matter began on July 23, 1985 and was completed on July 26, 1985. The jury found for defendant and against plaintiff on all of the common law claims. The case is before me at present for a determination regarding the statutory claims. The parties presented evidence on this issue throughout the four day trial.

II. *FACTS*

Plaintiffs' property is located approximately two and one-half miles from the city of Tillamook. It is primarily agricultural in nature with portions classified as forest land and flood plain. At all times from 1951 to the present, the plaintiffs have resided on the land. From 1951 to 1979, plaintiffs operated a commercial dairy farm on their property. Since 1979 they have leased the dairy operation to Jack and Sharon Bennet, their neighbors. In 1983 the Bennett's purchased the dairy herd and approximately one acre of land including a house from plaintiffs. At the present time, the Bennetts lease only the grazing land.

Prior to 1949, Tillamook County established a County solid waste disposal site on an 80 acre parcel of forest land owned by the County. Prior to the fall of 1980, the land was used as an open dump. Subsequent to that date the site was converted to a sanitary landfill.

A brief description of the area is in order. The landfill lies on a slope and consequently, water moves down the

hill in the direction of the Hallstrom property. Ekloff Road runs between the County property and that belonging to the Hallstroms. Water flows down from the County's property and under Ekloff Road through what is called the Hallstrom culvert and into the Hallstrom ditch which carries the water to Beaver Creek. Beaver Creek runs through the Hallstrom land in a generally east to west direction. The land between Beaver Creek and Ekloff Road is flood plain and thus is subject to flooding every winter.

Plaintiffs contend that the discharge of leachate (contaminated liquid) from the landfill has caused or contributed to bacterial and chemical pollution of the surface and ground water found on their land. They assert that this constitutes violations of RCRA and seek to enjoin the operation of the landfill.

III. *DISCUSSION*

Section 6972 of RCRA provides the jurisdictional basis for citizen suits. This provision authorizes private citizens to sue to enjoin solid waste practices that constitute "open dumping." RCRA prohibits "open dumping" except when a compliance schedule has been established in a state plan, and the facility is operated in conformity with the compliance schedule. 42 U.S.C. § 6945.

The criteria for determining what facilities and practices constitute open dumping are set forth in regulations enacted by the Environmental Protection Agency. 40 C.F.R. § 257. The regulations set out eight criteria, the violation of which constitutes open dumping. Plaintiffs focus on the criteria relating to surface and ground water.

A. *Surface Water*

Section 257.3-3(c) provides that:

> "(c) A facility or practice shall not cause non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or Statewide water quality management plan that has been approved by the Administrator under Section 208 of the Clean Water Act, as amended."

Non-point source pollution "refers to diffuse or unconfined sources of pollution where wastes can either enter into – or be conveyed by the movement of water to – public waters." OAR 340-31-006(17). The parties agree that the landfill is a non-point source.

Thus, we next turn to Oregon's State-Wide Water Quality Management Plan found at OAR Chapter 340, Division 41. OAR 340-41-205 sets forth specific water quality standards applicable to Tillamook County. The standards for bacterial pollution are set forth in OAR 340-41-205(2)(e) and (f):

> "(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the North Coast – Lower Columbia River Basin:
>
> . . . .
>
> "(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples):
>
> . . . .
>
> "(C) Estuarine waters other than shellfish growing waters: A log mean of 200 fecal coliform per 100 ml.

based on a minimum of 5 samples in a 30-day period with no more than 10% of the samples in the 30-day period exceeding 400 per 100 ml.

. . . .

"(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation or otherwise injurious to public health shall not be allowed."

1. *Fecal Coliform*

A large portion of both parties' proof concentrated on the presence or absence of fecal coliform on plaintiffs' land. Plaintiffs contend that the water leaving the dump and entering their land contains large amounts of fecal coliform in violation of OAR 340-41-205(2)(e)(C). The evidence presented by plaintiff indicated that in the fall of 1984, that was indeed the case. On the other hand, defendant put on equally persuasive evidence that from January 17, 1985 through June 24, 1985 the bacterial concentrations at the Hallstrom culvert did not exceed the statutory limit. Plaintiffs argue that their data is more accurate in that it was obtained during a time of normal rainfall whereas the winter and spring of 1985 were unusually dry. Defendant argues that its data is more representative of the conditions present in that it was taken over a longer period of time, ie., six months rather than three.

This apparent contradiction in the evidence would present a significant problem for the fact finder, however, I find that plaintiffs have failed in their burden of proof as dictated by the Oregon regulations. OAR

340-41-205(2)(e)(C) requires that evidence of bacterial contamination be presented in terms of logarithmic means. The only evidence at trial concerning log means was the testimony of Terry Rahe, on behalf of defendants. He testified that the use of log means presents a more realistic picture of the bacterial distribution. Mr. Rahe is a microbiologist and a consulting soil engineer. He testified that the samples taken between January and June of 1985 from the Hallstrom ditch showed a log mean of 61 fecal coliform per 100 millileters.

Plaintiffs, in their post-trial brief, reanalyzed their data, indicating the log means. However, I have reviewed the exhibits and evidence from trial and determined that plaintiffs failed to present their data in the manner required by the administrative rules. For that reason, I cannot find a violation of OAR 34-41-205(2)(e).

2. *Other Bacteria – Salmonella*

Subsection (2)(f) of OAR 340-41-205(2) makes "bacterial pollution . . . deleterious to waters used for- . . . livestock watering . . . or otherwise injurious to public health" a violation. Plaintiff contends that surface water leaving the garbage dump contains Salmonella and Shigella bacteria in numbers that present a public health hazard.

Exhibit 218, presented by Paul Stevens, president of the Water, Food and Research Lab, Inc., is the summary of data resulting from three sampling trips made on October 18, 25 and November 1 of 1984. The results show the presence of Salmonella and Shigella in Middle Beaver

Creek and the Hallstrom culvert. The presence of Salmonella and Shigella was confirmed biochemically and serologically. Plaintiffs argue that because none of these bacteria were found in Upper Beaver and large numbers were found in the Hallstrom culvert and Middle Beaver Creek, the source of the bacteria is the garbage dump located directly above and draining into the culvert.

According to the testimony of Jay Vasconcelos, a regional microbiologist for EPA who specializes in medical microbiology, Salmonella is considered to be an "indicator organism" which indicates the presence of pathogenic bacteria. Salmonella can cause disease in humans and animals, including typhoid fever. During cross examination, Mr. Vasconcelos testified that the concentrations of Salmonella found in the fall of 1984 constitute a "definite health hazard." In his opinion the problem is a surface one, not involving the ground water.

Further testing for Salmonella was done in June of 1985. None were found at that time by experts for either party. Plaintiffs once again argue that the absence of appreciable rainfall distorted the figures arising from the June sampling. Mr. Vasconcelos explained that rain influences the composition of surface water. Since bacteria is moved by water, higher concentrations of bacteria would be expected at times of greater rainfall.

OAR 340-41-205(2)(f) requires that plaintiff bring forward proof tending to establish by a preponderance of the evidence that there is in fact bacterial pollution either deleterious to waters used for livestock watering or injurious to public health. There is evidence of harmful concentrations of Salmonella in the fall of 1984. However,

there is no evidence of the presence of Salmonella from June of 1985 through the time of trial. Further, as defendant points out, there is no evidence that the waters of Beaver Creek are used for domestic purposes, irrigation, bathing or shellfish propagation. The creek *is* used for livestock watering. Norm Bennett, one of the leasees of the property testified that the Bennett cattle routinely drink from Beaver Creek without suffering any ill effects.

The land between Ekloff Road and Beaver Creek is used to pasture heifers in all seasons but winter. During the winter months the pasture area is flooded. The only practical use of the area is as pasture land. Plaintiffs did not present any evidence of particular health hazards associated with the presence of Salmonella on plaintiffs' land. There was no actual proof of harmful effects from the landfill operation on the only beneficial use of the land.

There is some question in my mind whether OAR 340-41-205(2)(f) requires only proof of potential public health hazards or if there must be proof of actual injury to public health. There is certainly proof in this case that a potential hazard existed in the fall of 1984, however, as I said above, the only possible beneficial use of the land adjacent to and flooded by Beaver Creek is as pasture land. I need not resolve that question, however, as I find that plaintiff has proven other violations of the Oregon State-Wide Quality Management Plan having to do with surface water which mandate the remedy I will set out below.

3. *Other Water Quality Standards*

OAR 340-41-205(2)(j), (k) and (l) prohibit:

> "(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.
>
> "(k) objectionable discoloration, scum, oily sleek, or floating solids, or coating of aquatic life with oil film shall not be allowed.
>
> "(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed."

Ample proof was presented at trial to persuade me, by a preponderance of the evidence that leachate escapes from the confines of the landfill onto plaintiffs' land. The testimony at trial indicated that the leachate is generally dark yellow or brown in color with an offensive odor. There was evidence of "ponding" and overflows of leachate at the pumphouse and sump. The escaping leachate mixes with rain run-off and runs down the hill in channels through the Hallstrom culvert, into the Hallstrom ditch and on into Beaver Creek. Mr. Hallstrom testified that although there was no leachate spilling at the time of trial, there was no improvement in the amount of leachate on his land over the winter months. As this summer has admittedly been drier than usual, the amount of leachate produced would be expected to be less.

There was testimony from several witnesses that the leachate has had an adverse effect on the waters of Beaver Creek and the Hallstrom ditch. Norm Bennett testified that he could see that the leachate had contaminated

the stream. He has noticed leachate flowing into the creek making it look "ugly." He has also noted that it sticks to the bottom, creating a build-up of sludge. On several of his sampling trips, Mr. Stevens observed a reddish cast to the water in the Hallstrom ditch and a build-up of "gunk on the bottom." Mr. Hallstrom testified that water mixed with foul-smelling leachate drains onto his land and into the Hallstrom ditch and Beaver Creek. The leachate creates an oily film on the water and causes the build-up of sludge on the bottom of the ditch.

All of his convinces me that there has been and will continue to be violations of OAR 340-41-205(2)(j), (k) and (l). Furthermore, although plaintiffs did not provide ample proof of violations regarding fecal coliform and there is question about further bacterial violations in the form of Salmonella, these problems are undoubtedly contributed to by the escape of leachate from the confines of the landfill. For those reasons, I conclude that some remedy is necessary to rectify the situation. Since that is my conclusion, I need not go further and address plaintiffs' other allegations of violation of RCRA. As noted above, RCRA incorporates the standards of water quality set out in Oregon's State-Wide Water Quality Management Plan. Therefore, a violation of OAR 340-41-205(2) is also a violation of RCRA.

IV. *REMEDY AND CONCLUSION*

Plaintiffs seek injunctive relief and ask that I order the landfill closed. I do not feel that in this instance that would be an appropriate remedy. It is within my discretion to refuse to issue an order of immediate cessation.

The better interpretation of RCRA is that it permits the court to order the relief it considers necessary to secure prompt compliance with the Act. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320 (1982) (interpreting the citizen suit provisions of the Federal Water Pollution Control Act, which are nearly identical to those of RRA).

I do not believe closure of the dump is necessary to obtain compliance with RCRA. It is my intention to obtain complete and permanent containment of the leachate generated by the landfill. To achieve that goal, defendant is ordered to submit a proposal outlining the steps necessary to achieve permanent and complete containment of the leachate within the boundaries of the landfill site within sixty (60) days of entry of this order.

Subsequent to the entry of an Order consistent with the above, claims for attorney fees will be addressed in supplementary submissions by the parties.

The foregoing constitutes my Findings of Fact and Conclusions of Law pursuant to Rule 52(a) Fed. Civ. P.

Dated this 30 day of September, 1985.

/s/ George E. Juba
United States Magistrate

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, vs. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481-JU FINAL JUDGMENT AND DECREE (Filed June 23, 1986)

This case was tried commencing July 23, 1985, The Honorable George E. Juba presiding. Plaintiffs' claims for common law nuisance and trespass and for inverse condemnation under the Oregon Constitution were tried to a jury. Plaintiffs' claims for violation of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 USC § 6901, *et seq.*, were tried to the Court.

On July 29, 1985 the jury returned its verdict for the defendant and against the plaintiffs on all of plaintiffs' state law claims for damages for compensation.

On September 30, 1985, the Court entered its *OPINION AND ORDER*, finding that defendant had violated Section 257.3-3(c) of RCRA.

On June 23, 1986, the Court entered its *ORDER AND DECREE*, requiring defendant to take steps as set forth therein to prevent future escapes of leachate from the landfill boundary.

Accordingly, it is hereby ADJUDGED AND DECREED that:

(1) Defendant comply with the terms of the ORDER AND DECREE of June 23, 1986; and that

(2) Defendant have judgment in its favor on plaintiffs' claims for trespass, nuisance and inverse condemnation.

DATED this 23 day of June, 1986.

/s/ George E. Juba
George E. Juba
UNITED STATES MAGISTRATE

Presented By:

/s/ James G. Driscoll
James G. Driscoll

Of Attorneys for Defendant

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,

v.

TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.
Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

As Amended on Denial of Rehearing and Rehearing En Banc April 7, 1988.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

ORDER

The panel voted unanimously to deny the petition for rehearing. The majority of the panel voted to reject the suggestion for rehearing en banc. Judge Pregerson was in favor of granting the suggestion for rehearing en banc.

A call for an en banc vote was made and the case failed to receive a majority of the votes of the active circuit judges in favor of rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

AMENDED OPINION

EUGENE A WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental Protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ) before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901, *et seq*. Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

> 42 U.S.C. § 6972(b)(1) provides:
> No action may be commenced under . . . this section . . . prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] . . .

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981). Courts have construed these provisions identically despite slight differences in wording. *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff

allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700.

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpretations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Council v. Callaway*, F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance*, 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council*, 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the

notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton*, 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia*, 761 F.2d at 78. *See also Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir.1975), *cert. denied*, 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicity, unconditional statutory language.'" *Garcia*, 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes

clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA

or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit if filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33,104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction over the RCRA claim. Because the court lacked federal jurisdiction at the time the suit was filed, it lacked pendent jurisdiction also. The federal court's power to exercise pendent jurisdiction derives from its federal jurisdiction. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Hunter v. United Van Lines*, 746 F.2d 635, 649 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L. Ed.2d 150 (1985).

Without federal jurisdiction, a federal court has no power to hear state claims. *Hunter*, 746 F.2d at 649: "the federal court acquires its power over the [pendent] claim . . . only if the court has previously properly been seized of jurisdiction. The federal court's jurisdiction over the

state-law claim is entirely derivative of its jurisdiction over the federal claim." (citations omitted).

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded to dismiss and vacate the court's opinion. We reverse the award of fees to the county.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to the EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 6972 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced . . . under this section . . . prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the state in which the alleged violation occurs; and (iii) to any alleged violator . . . " We must decide whether this requirement acts to deprive a district court of jurisdiction

over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held the the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act): *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C. Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §§ 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 601. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance,* 619 F.2d at 243.

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(6)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONERS' OPENING BRIEF

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QUESTION PRESENTED

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 ed. and Supp. III) ("RCRA") provides for citizen enforcement by "citizen suits." RCRA requires each citizen suit to be preceded by 60 days notice of the violation from the plaintiff to the Administrator of the Environmental Protection Agency, the State where the alleged violation occurred, and the alleged violator.

The Hallstroms gave the required 60 day notice to Tillamook County before filing this citizen suit, but they did not notify the Administrator or the State until after the suit was filed. Neither the Administrator nor the State were parties. The State had actual notice of the violation for a year and a half before the citizen suit was filed.

The question presented is whether the 60 day notice requirement is jurisdictional (requiring dismissal followed by refiling 60 days after formal notice) or procedural, and therefore subject to waiver, equitable modification, and cure.

LIST OF PARTIES AND CORPORATIONS

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners

TILLAMOOK COUNTY,
a municipal corporation
with no affiliation to any
parent or subsidiary or
related corporation,

Respondent

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PETITIONERS' OPENING BRIEF

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 831 F.2d 889 (1987). The amended opinion of the court of appeals (J.A. 87-96) is reported at 844 F.2d 598 (1988). The opinion of the district court (J.A. 56-57) on the question presented is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-8a) was entered on November 3, 1987. A timely petition for rehearing was denied and an amended judgment (J.A. 87-96) was entered on April 7, 1988. The petition for a writ of certiorari was timely filed on July 6, 1988. The petition was granted on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 7002 of the Resource Conservation and Recovery Act, 90 Stat. 2825, 42 U.S.C. § 6972 (1982 ed., Supp. III) provides:

§ 6972. Citizens suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in

which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order; *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter

may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

2. In 1984, Congress amended 42 U.S.C. § 6972 to authorize citizen suits to restrain solid waste practices "which may present an imminent and substantial endangerment to health or the environment." 98 Stat. 3268. The pertinent provisions in subsections (a) and (b) remained substantially the same except that Congress added "prohibition" after "requirement."

3. EPA Regulations on Prior Notice of Citizen Suits [under RCRA], 40 C.F.R. § 254 (1988) are set forth in Pet. App. D 20a-23a.

4. The following statutes contain identical or substantially similar 60-day notice provisions for citizen suits:

a. Section 505(a) and (b) of the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365(a) and (b) (1982 ed.).

b. Section 304(a) and (b) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 7604(a) and (b) (1982 ed.).

c. Section 105(g)(1) and (2) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415(g)(1) and (2) (1985 ed.).

d. Section 12(a) and (b) of the Noise Control Act of 1972, 86 Stat. 1243, 42 U.S.C. § 4911(a) and (b) (1982 ed.).

e. Section 16(a) and (b) of the Deepwater Port Act of 1974, 88 Stat. 2140, 33 U.S.C. § 1515(a) and (b) (1982 ed.).

f. Section 1449(a) and (b) of the Safe Drinking Water Act, 88 Stat. 1690, 42 U.S.C. § 300j-8(a) and (b) (1982 ed.).

g. Section 520(a) and (b) of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U.S.C. § 1270(a) and (b) (1982 ed.).

h. Section 20(a) and (b) of the Toxic Substance Control Act, 90 Stat. 2041, 15 U.S.C. § 2619(a) and (b) (1982 ed.).

i. Section 310(a) through (d) of the Comprehensive Environmental Response, Compensation, and Liability Act, 100 Stat. 1703, 42 U.S.C. § 9659(a) through (d)(Supp. IV 1986).

j. Section 11(g)(1) and (2) of the Endangered Species Act of 1973, 87 Stat. 897, 16 U.S.C. § 1540(g)(1) and (2) (1982 ed.).

k. Section 23(a)(1) and (2) of the Outer Continental Shelf Lands Act, 92 Stat. 657, 43 U.S.C. § 1349(a)(1) and (2) (1982 ed.).

l. Section 11(a) and (b) of the Act to Prevent Pollution from Ships, 94 Stat. 2302, 33 U.S.C. § 1910(a) and (b) (1982 ed.).

m. Section 24(a) of the Consumer Product Safety Act, 86 Stat. 1226, 15 U.S.C. § 2073(a) (1982 ed.).

STATEMENT OF THE CASE

The Hallstroms invoked the jurisdiction of the district court under § 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 ("RCRA"), and under 28 U.S.C. § 1331 (federal question). J.A. 3-4 (complaint), 59, 70-72 (pretrial order).

The Hallstroms own and reside on a dairy farm located next to the Tillamook County Landfill. J.A. 60. The Hallstroms filed this action to compel Tillamook County to operate its landfill in compliance with the standards and requirements established under RCRA. J.A. 3-10. The Hallstroms also sought damages for state claims of inverse condemnation, trespass, and nuisance. *Id.*

On April 20, 1981, the Hallstroms mailed formal notice of the violation and of their intention to sue Tillamook County to compel compliance with RCRA. J.A. 61. The Hallstroms did not send a copy of this formal notice to the Administrator of the Environmental Protection Agency or Oregon's Department of Environmental Quality ("DEQ"). J.A. 27.

On April 9, 1982, the Hallstroms filed the complaint in this case. They did not name the Administrator or DEQ as parties defendant. J.A. 3-10; 61.

For at least a year and a half before the Hallstroms filed this citizen suit, DEQ had actual knowledge of the violations and sent several enforcement letters to Tillamook County. Plaintiffs' Exhibit 7 is a chronology that DEQ prepared. Some of the events listed are:

10/14/80 -	"Informative" enforcement letter sent to county. Monitoring wells damaged, drainage problems, excessive litter.
12/23/80 -	Stronger enforcement letter sent to county. Leachate overflowing berm. Leachate system problems. Too much exposed waste. Inadequate cover.
1/26/81 -	Very strong enforcement letter sent to county. Monitoring wells damaged, leachate system problems, drainage problems, erosion problems, too much exposed waste.
4/23/81 -	Permit issued for "new" landfill (current permit).
7/12/82 -	Notice of Violation issued to county. Monitoring wells damaged, leachate system problems, too much exposed refuse, excessive litter.
1/03/83 -	Notice of Violation issued to county. Excessive litter.
3/21/83 -	"Informative" enforcement letter sent to county. Additional monitoring wells needed. Better wet months cover material needed. Leachate system improvements needed.

By June 29, 1982, and certainly no later than December 1982, DEQ had actual knowledge of the Hallstroms' citizen suit. J.A. 35-37.

By January 17, 1983, EPA had actual knowledge of the Hallstroms' citizen suit. J.A. 23-25.

On March 1, 1983, Tillamook County filed a motion for summary judgment asking the district court to dismiss the case because 60 days advance notice had not been given to the EPA or DEQ. J.A. 15-25.

The next day, on March 2, 1983, the Hallstroms sent a copy of their original notice of the violation to the EPA and DEQ. J.A. 40-43. At the same time, the Hallstroms notified the EPA and DEQ of their intention to refile the citizen suit if the trial court dismissed the case. *Id.*

On April 22, 1983, nine (9) days before the 60 day notice period would have expired, the district court held that dismissal for failure to give notice to the EPA and DEQ "would be a waste of judicial resources." J.A. 56-57. The district court said in its opinion:

> Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

Id.

In the pretrial order lodged with the district court, the Hallstroms again alleged subject matter jurisdiction under 42 U.S.C. § 6972 and notice. J.A 58-59, 70, 72.

Trial began over two years later on July 23, 1985, and was completed on July 26, 1985. J.A. 75. The district court found that Tillamook County had violated and would continue to violate RCRA, and it ordered Tillamook County to propose a plan that would completely and permanently contain leachate generated by the landfill within the landfill boundaries. J.A. 83-86. The state claims were tried to a jury, which found for Tillamook County on the three state claims. J.A. 75.

After the final judgment was entered, the Hallstroms moved for an award of $42,000 in attorney fees and $53,000 in expert witness fees that they paid in connection with their citizen suit. Excerpt at 181-190. The district court denied the Hallstroms' motion even though it found that Tillamook County had violated RCRA and would continue to do so unless restrained. J.A. 74-86; Excerpt at 228-236.

The Hallstroms appealed this decision and other rulings to the Ninth Circuit. The Ninth Circuit, however, limited its review to the question now before this Court.

The majority interpreted the statute to say that 60 days notice is a precondition to the district court's subject matter jurisdiction, and remanded the case for dismissal. J.A. 88. The dissent interpreted the statute to require that 60 days elapse before the district court may act. The dissent reasoned that a stay would further the goal of agency enforcement while avoiding the excessively formalistic requirement of dismissal followed by refiling. J.A. 96.

SUMMARY OF ARGUMENT

The text, structure, and legislative history of RCRA's citizen suit provisions indicate that the 60 day notice requirement is not jurisdictional. It is instead a procedural requirement that should be applied in light of its purpose, and is subject to waiver, estoppel, and equitable modification or cure.

Subsection (a) creates the right of citizens to enforce RCRA by civil action in court and expressly grants to the district courts subject matter jurisdiction over citizen enforcement actions. The remaining subsections govern other matters such as notice, the effect of pending government actions, litigation costs, intervention, and the preservation of other rights. Subsection (a) does not limit this district court's jurisdiction to cases commenced after 60 days notice.

An interpretation that the notice requirement is not jurisdictional furthers the general purpose of RCRA and its citizen suit provision, to protect the environment from open dumping and to encourage citizen enforcement as a supplement to government enforcement, without undermining the particular purpose of the notice requirement, to trigger government action.

A nonjurisdictional interpretation is consistent with the general principles of statutory construction to interpret to accomplish the purpose of the legislation and to avoid unreasonable or futile results plainly inconsistent with the general purpose of the legislation as a whole.

A nonjurisdictional interpretation is consistent with this Court's decisions in *Gwaltney*, *Middlesex*, and *Zipes v. Trans World Airlines*. In *Zipes*, this Court unanimously held that timely filing of a charge with the EEOC was not a jurisdictional requirement to a Title VII suit in federal court, but was instead subject to waiver, estoppel, and equitable modification. The same analysis used in *Zipes* applies with equal force here.

The notice requirement was waived by the government – neither EPA nor DEQ commenced an enforcement action after receiving actual or formal notice of the violation. The failure to give notice was cured by formal notice of the violation and of intent to sue after the case was filed but over two years before trial (and before Tillamook County was ordered to comply with RCRA). The Hallstroms justifiably relied on the district court's decision that dismissal and refiling was not required.

ARGUMENT

1. The Text And Structure Of The Statute Do Not Limit Jurisdiction To Cases In Which 60 Days Notice Was Given.

The two subsections of the citizen suit section of RCRA, § 7002(a) and (b), 42 U.S.C. § 6972(a) and (b) provide in pertinent part:

> Citizen suits.
>
> (a) In general
>
> Except as provided in subsection (b) . . . of this section, any person may commence a civil action on his own behalf –
>
> (1) against any person . . . who is alleged to be in violation of any permit, standard, regulation,

condition, requirement, or order which has become effective pursuant to this chapter;

. . .

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, ...

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order: *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

a. Subsection (a).

Subsection (a) creates the right of citizens to enforce RCRA and expressly grants to the district courts subject matter jurisdiction over such enforcement actions. The remaining subsections of § 7002 govern other matters such as notice, the effect of pending government enforcement actions, costs and attorney fees, intervention by

citizens and the government, and the preservation of other rights.

To invoke the district court's jurisdiction, the citizen must allege in good faith a continuing violation of RCRA. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

Subsection (a) does not limit jurisdiction to those cases where 60 days notice was given or where there is no pending government enforcement action. The provision requiring 60 days notice is entirely separate and does not speak in jurisdictional terms or refer to the jurisdiction of the court.

b. Subsection (b)(1).

Subsection (b)(1) requires the citizen to give 60 days notice of the violation to the alleged violator and the government.

Notice to the violator gives him a chance to bring himself into complete compliance in 60 days. If the violator comes into complete compliance in 60 days and it is absolutely clear that the violation cannot reasonably be expected to recur, then the citizen suit is unnecessary. If the citizen cannot in good faith allege a continuing violation, the district court does not have subject matter jurisdiction under subsection (a). *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

Notice of the violation to the government should trigger government action. The Senate Committee Report on the Clean Air Amendments said:

> In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State air pollution control agency and the alleged polluter.

116 Cong. Rec. 32,926 (1970).

If government action is successful in compelling the violator into complete compliance in 60 days, then the citizen suit is unnecessary and the district court lacks subject matter jurisdiction, again under subsection (a), because the citizen could no longer allege in good faith a continuing violation. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

c. Subsection (b)(2).

Subsection (b)(2) provides that if the government has commenced, and is diligently prosecuting, an action in court to compel compliance, a citizen suit is prohibited. Thus, if the government decides to act after receiving notice, but is unsuccessful in compelling the violator to comply with RCRA, the government then has a choice of (1) doing nothing further, (2) continuing efforts to compel compliance by action out of court, or (3) filing an enforcement action in court. Only one of these three alternatives can prevent a citizen suit from proceeding, *i.e.* filing and diligently prosecuting an enforcement action in court. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 379, 383 (1987).

If the government commences an enforcement action within the 60 day period and diligently prosecutes it, the citizen suit is barred. This bar, however, is not a jurisdictional bar. The legislative history to the Clean Air Amendments of 1970 indicates that the district courts have jurisdiction over citizen suits even when the government has commenced and is diligently prosecuting an action in court. The Senate Committee Report states:

> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

116 Cong. Rec. 32,926 (1970).

Thus, if the district court determined that the government had commenced and was diligently prosecuting an action in court to require compliance, the district court would still have authority to do one of three things: dismiss, stay, or consolidate the citizen suit. If the district court has authority to do any of those things, then it has subject matter jurisdiction.

2. A Procedural Interpretation Serves The Particular Purpose Of The Notice Provision Without Doing Violence To The Overriding Purposes Of RCRA Of Protecting The Environment And Encouraging Citizen Enforcement.

a. The Purpose Of RCRA.

The purpose of RCRA is to protect the environment from the hazards of open dumps such as the Tillamook County Landfill. The House Committee Report said:

> The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H.R. Rep. No. 94-1491 - Part I, 94th Cong., at 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6241-42.

b. The Purpose Of RCRA's Citizen Suit Provision.

The purpose of the citizen suit provision of RCRA, as well as similar provisions in the other federal statutes, is to authorize citizens to act as private attorneys general to protect the environment as a supplement to government enforcement.

The Senate Committee, in its report on the proposed citizen suit provisions of the Clean Air Amendments of 1970, 42 U.S.C. § 7604(a) and (b), said:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions

> which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is reached, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

116 Cong. Rec. 32,927 (1970).

As Senator Hart observed while speaking in support of the citizen suit provision of the Clean Air Amendments, citizen suits were designed to protect the environment when government resources are inadequate:

> The basic argument for the [citizen suit] provision is plain: namely that Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur. In testifying on a similar bill before the Senate Subcommittee on Energy, Natural Resources and the Environment, former Attorney General Ramsey Clark spoke convincingly of this inevitable incapability. Mr. Clark stated:
>
> It will be impossible for government enforcement to control all significant acts of pollution. . . .The extension of private right, . . . and effective sanctions for the persons directly affected or concerned will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination, such as in schooling, employment, and housing tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.
>
> Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our

> lives, we must give the individuals affected by, or concerned about pollution in his life, the power to stop them through legal process.
>
> Far from risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement . . . and an effective and desirable prod to officials to do their duty.

116 Cong. Rec. 33,104 (1970).

In answer to a concern that citizen suits might burden the courts with a flood of litigation, Senator Hart observed that it would be the rare citizen who would undertake the financial burden of acting as a private attorney general:

> First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill. For the most part, only in the case where there is a crying need for action will action in fact be likely.

Id.

Because citizen suits were designed to supplement government enforcement efforts hampered by inadequate resources, they should be encouraged and welcomed. In *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), the Second Circuit said:

> In enacting § 304 of the 1970 Amendments [to the Clean Air Act], Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the

> vindication of environmental interests. Fearing that administrative enforcement might falter or stall, "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." [Citation omitted.]

c. The Purpose Of The Notice Provision.

When subsections (b)(1) and (b)(2) are read together and considered in light of their legislative history, it is apparent that the purpose of the notice requirement is to prod the government to act and act quickly, *i.e.* within 60 days, by (1) pressuring the violator to come into complete compliance or (2) commencing an enforcement action in court.

The purpose of triggering government action is served when notice of the violation is received by the government, regardless of whether it is received before or after commencement of the citizen suit, as long as the district court takes no action on the suit such as issuing an injunction or temporary restraining order. The Senate Report on the citizen suit provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365, provides:

> No action on a suit may begin for 60 days following notification. If EPA or the State begins a civil or criminal action on its own against the alleged violator, no court action may take place on the citizen's suit.

S.Rep. 92-414, 92d Cong., *reprinted in* [1972] U.S. Code Cong. & Ad. News 3745.

If the citizen fails to give notice of the violation to the government before commencing suit, a stay until 60 days

after notice will serve the particular purpose of triggering government action. If the government succeeds in compelling the violator into complete compliance in 60 days, then the case would be dismissed for lack of subject matter jurisdiction under subsection (a) and *Gwaltney* because the citizen could no longer allege in good faith a continuing violation. If the government files an enforcement action in court, then the district court has jurisdiction to dismiss, stay, or consolidate the citizen suit. If the government does nothing and the violator does not bring itself into complete compliance, then the citizen suit could proceed with no prejudice to the violator and with no violence to the general purpose of RCRA (to protect the environment from open dumping) or to the particular purpose of the notice requirement (to trigger government action).

Thus, the text, structure, legislative history, and purpose of the citizen suit provision indicate that notice is a procedural, not a jurisdictional, requirement that should be applied in light of its particular purpose of encouraging government enforcement while not defeating the overriding purpose of RCRA to protect the environment.

3. The Principles Of Statutory Construction Indicate That The Notice Requirement Is Not Jurisdictional.

a. The Language Is The Starting Point.

As is frequently said, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reason why the language of the

statute itself is the starting point, and not the end point, is because the purpose of the statute may be defeated by a literal reading. In *Lynch v. Overholser*, 369 U.S. 705 (1962), Justice Harlan said:

> The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for "literalness may strangle meaning."

369 U.S. at 710.

Justice Stevens said much the same thing in his dissent in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982):

> In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.

458 U.S. at 578 (quotation in footnote from *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), omitted).

Here, subsection (b) provides that no citizen suit may be commenced until 60 days after notice of the violation. The statute does not provide that notice is a jurisdictional requirement. The provision granting jurisdiction to the district courts and the provision requiring notice are in separate subsections. The notice section does not speak in jurisdictional terms or refer in any way to the district court's jurisdiction.

A similar question was presented in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In that case, the question presented was whether the timely filing of a charge with the Equal Employment Opportunity Commission was a jurisdictional requirement for bringing a Title VII action in federal court. Justice White, writing for a unanimous Court, held that the filing requirement was not jurisdictional, in part because the provision granting jurisdiction does not, by its terms, limit jurisdiction to cases preceded by a timely filing with the EEOC. 455 U.S. at 394-95.

b. Interpret According To Purpose.

When the words of the statute do not resolve the question, the statute should be interpreted to give effect to its purpose. In *United States v. Shirey*, 359 U.S. 255 (1959), Justice Frankfurter said:

> Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to meaning than any rule which grammar or formal logic may lay down." This is so because the purpose of an enactment is imbedded in its words even though it is not always pedantically expressed in words. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose."

359 U.S. at 260-61 (citations omitted).

As noted above, the primary purpose of RCRA is to protect the environment from open dumping. The particular purpose of the citizen suit provision is to provide for

citizen enforcement to supplement government enforcement. The particular purpose for notice to the government is to trigger government action that might render a citizen suit unnecessary. However, there are only two kinds of government action that can prevent a citizen suit: (1) action that compels a violator into complete compliance within 60 days, and (2) a civil or criminal action filed in court by the government within 60 days to compel compliance. Of those two, only complete compliance by the violator with no reasonable expectation of recurrence of the wrongful behavior can affect the district court's subject matter jurisdiction. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 386 (1987); *see* discussion of subsection (b)(2) in Part 1.c., pp. 14-15 above.

An interpretation that notice is not a jurisdictional requirement serves the particular purpose of the notice requirement without defeating the general purposes of RCRA and its citizen suit provision of (1) protecting the environment from open dumping, and (2) encouraging citizen enforcement when the government lacks the human and financial resources for its own enforcement action.

It should be mentioned that in *Zipes*, the Court considered legislative history, case law, and the purpose to be served by the filing requirement in addition to the words of the statute. Legislative history and case law were not dispositive, so the Court considered both the remedial purpose of Title VII and the particular purpose of the filing requirement.

The Third, Eighth, and District of Columbia Circuits have interpreted the notice requirement to be procedural, not jurisdictional. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3rd Cir. 1980), *cert. denied* 449 U.S. 1096 (1981); *Hempstead Cty. and Nevada Cty. Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 702 (D.C. Cir. 1975)(court has jurisidiction but should exercise discretion to stay suit when requested by EPA).

In *Susquehanna*, the Third Circuit concluded that interpreting the notice requirement "to require dismissal and refiling would be excessively formalistic." 619 F.2d at 243. In *Hempstead*, the Eighth Circuit said that notice is a requirement that had not been formally met, "but [we] note that the purpose of such notice has long been satisfied in the instant action." 700 F.2d at 463.

In contrast, circuit court cases that interpret the notice requirement as jurisdictional ignore the general purpose of federal environmental law, elevate form over substance, and are based on an erroneous analysis of the purpose of the notice requirement.

In *Garcia v. Cecos Intern., Inc.*, 761 F.2d 76 (1st Cir. 1985), the court began its analysis with the legislative history that indicated that the purpose of the notice provision was "to trigger the [EPA's] enforcement mechanism." 761 F.2d at 81. From that, the court inferred that Congress must have intended the notice provision to be an absolute requirement because Congress must have believed that after a citizen suit is filed (rather than merely threatened in a formal written notice) positions will become hardened, lawyers employed, legal fees paid,

and the government will somehow have "less room for maneuver and compromise." 761 F.2d at 82. The court concluded that settlement is much more likely when suit is threatened rather than filed:

> Permitting immediate suit ignores the possibility that a violator or agency may change its mind as the threat of suit becomes more imminent. After the complaint is filed the parties assume an adversary relationship that makes cooperation less likely. Because a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty-day non-adversarial period to the parties, we would therefore dismiss suits where the complaint is filed less than sixty days after actual notice to the agency and the alleged violators.

761 F.2d at 82.

There are several problems with this analysis.

First, it is well known that the threat of a lawsuit is not nearly as strong an inducement to settlement as an actual lawsuit. Indeed, there is nothing like an imminent trial date to get people into the spirit of compromise.

Second, there is nothing in the text of the statute or in its legislative history that supports the idea that the purpose of the 60 day period was to keep the citizen-plaintiff and the violator from being adversaries. Once the citizen suit procedures are initiated, whether by giving formal notice to the violator or by commencing an action, the citizen and the violator are adversaries.

Third, the court does not explain how a dismissal of a pending lawsuit can "restore a sixty-day non-adversarial period to the parties." The reality is that people become

adversaries long before they resort to court procedures. People do not magically become non-adversaries when their case is dismissed, particularly when the case is dismissed because of a technical procedural requirement. Quite the contrary.

Fourth, the court does not explain how a non-judicial resolution would become more likely if the citizen suit were dismissed rather than merely stayed for the 60 day period. The court did quote the dissenting opinion of Judge Merritt in *Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983) as arguing that a stay for 60 days "would provide little incentive for plaintiffs to seek alternative methods of resolving their disputes" because "positions may have hardened, lawyers employed and legal fees paid." However, that analysis ignores the reality that lawyers will have to be employed and legal fees will have to paid for the formal written notice as well as the initial complaint.

The Ninth Circuit relied heavily on *Garcia* in *Hallstrom v. Tillamook County*, 844 F.2d 598 (9th Cir. 1988), J.A. 87-96:

> We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely.

844 F.2d at 601, J.A. at 92 (citation to *Garcia* omitted).

Again, the Ninth Circuit does not explain how dismissal and refiling can work better than a stay to encourage non-judicial resolution of the conflict or the triggering of government action.

In *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the court concluded that notice is a jurisdictional requirement because:

> Congress evidently believed that the filing of a private lawsuit hardens bargaining positions and leaves the Administrator with less room to maneuver, and that the private lawsuit should be a supplemental enforcement tool, rather than a substitute for agency enforcement.

761 F.2d at 317.

There are several problems with this analysis as well.

First, there is nothing in the statute or its legislative history to support the inference that Congress believed that the filing of a lawsuit hardens bargaining positions.

Second, there is nothing in the statute or its legislative history to support the inference that a citizen suit would leave the government with "less room to maneuver." There is nothing about the filing of a citizen suit that will somehow curtail the government's authority, and there is certainly nothing magical about dismissal of a citizen suit that will enhance the government's authority. If anything, dismissal of a citizen suit would most likely encourage the violator to continue to violate the law rather than obey it.

Third, the court does not explain how a stay for 60 days would be any less effective than dismissal in honoring Congress's intention that citizen suits be a supplement to, rather than a substitute for, government enforcement.

Garcia, Hallstrom, and *Walls* have the same basic flaws. They misconstrue the purpose of the notice provision, they ignore the general remedial purposes of federal environmental law to protect the environment and encourage citizen enforcement, and they do not adequately explain how dismissal and refiling serves the purpose of the statute better than a stay.

c. Interpret to Avoid Futile, Absurd, Or Unreasonable Results That Defeat Purpose.

If the bare words of the statute would produce an absurd or futile result, or one contrary to the underlying purpose of the statute, the court should interpret the statute to carry into effect the end Congress wanted to accomplish. In *White v. Texas*, 310 U.S. 534 (1940), Justice Reed observed:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.

310 U.S. at 543 (citations omitted).

In this case, the Hallstroms successfully brought an action against Tillamook County to compel compliance with RCRA. DEQ had actual knowledge of the violation for a year and a half before the citizen suit was commenced. Although the EPA and DEQ were not formally notified of the violation before the citizen suit was filed, they had actual knowledge, as well as formal notice, of the violation and the citizen suit more than two years before trial began. The EPA and DEQ did not object to not having received notice, and they did not file enforcement actions of their own. The case proceeded to trial, and the environment was at least partly protected. The district court ordered Tillamook County to contain all surface water pollution within the landfill boundaries. It was the purpose of RCRA and its citizen suit provisions to allow citizens like the Hallstroms to bring this kind of enforcement action and obtain this kind of result.

The Ninth Circuit's jurisdictional interpretation would undo all that for no reason. After all, DEQ knew about the violation, and only DEQ, not the EPA, has authority under RCRA to initiate an administrative proceeding to enforce compliance with the solid waste subchapter, §§ 4001-4009, 42 U.S.C. §§ 6941-6949. Furthermore, neither the EPA nor DEQ filed an enforcement action in court or voiced any objection to having received notice after the Hallstroms' citizen suit was filed.

In *Hallstrom,* the Ninth Circuit also based its decision on its conclusion that a procedural interpretation would

render the notice provision worthless. 844 F.2d at 601, J.A. at 92-93. This is not true.

First, the purpose of triggering government action is served whether the citizen suit is stayed or required to be dismissed and refiled. Second, an interpretation that the notice requirement may be waived or modified when required by equity does not make the notice requirement worthless. Here, DEQ, the agency with administrative enforcement authority, had notice of the violation a year and a half before the citizen suit was commenced. Third, citizen-plaintiffs would ordinarily comply with a procedural notice requirement in the hope of triggering government enforcement action while still having a right to intervene under subsection (b) (2). Fourth, citizen-plaintiffs would ordinarily comply with a procedural notice requirement to avoid the expense and delay of responding to a defense based on failure to give notice. Fifth, citizen-plaintiffs would ordinarily comply with a procedural notice requirement to avoid the loss of court costs and attorney fees if the violator brought himself into complete compliance during the 60 day period while the case was stayed.

Thus, a procedural interpretation would lead to results consistent with the remedial purpose of the statute and with the particular purpose of the notice requirement. A jurisdictional interpretation, on the other hand, would often lead to absurd or unreasonable results plainly at variance with the general purpose of RCRA and other federal environmental statutes in other instances.

For example, suppose that before bringing a citizen suit, the citizen contacts the EPA, DEQ, and the violator. The EPA and DEQ both tell the citizen that they lack the resources even to investigate, much less do anything, about the problem. The violator does not have much use for meddling citizens or environmental laws and says, "Go ahead and sue." A jurisdictional interpretation would require 60 days to elapse after formal notice even though the notice and the waiting period would be entirely futile. A procedural interpretation, on the other hand, would make the notice and 60-day waiting period subject to waiver.

For another example, suppose a citizen suit is brought under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(1) and (2), after giving the required formal notices to the government and the violator. Suppose further that additional facts come to light during discovery that support a claim under the Act to Prevent Pollution From Ships, 33 U.S.C. § 1911(a) and (b). If the citizens gave the required notices under the Ships Act and then waited 60 days before amending their original complaint to state a claim under the Ships Act, a jurisdictional interpretation would result in the district court's not having subject matter jurisdiction over the Ships Act claim because the action was not commenced 60 days after notice. *See* Fed.R.Civ.P. 15(c) (Relation Back of Amendments). Instead, the citizen would have to file a new action based on the Ships Act violation, and then move to consolidate the two cases. There may also be a issues concerning whether discovery in the first case could be used in the second case and whether a bifurcated trial was required.

As a final example, suppose three companies are acting together in flagrant violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, that the citizen gave 60 days formal notice to the government but only two of the three violators, and that the three companies refused to comply. A jurisdictional interpretation, the interpretation that Tillamook County wants this Court to adopt, would result in dismissal of the citizen suit against all three violators.

4. A Procedural Interpretation Is Consistent With Case Law.

a. A Procedural Interpretation Is Consistent With *Gwaltney*.

In *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376 (1987), this Court wrote that the purpose of the 60-day notice requirement in an identical citizen suit provision in the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1), is to give the violator an opportunity to bring itself into complete compliance and to give the government time to file a civil enforcement action in court. 108 S.Ct. at 382-83. This Court's interpretation of the purpose of the notice provision is consistent with *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208-09 (4th Cir. 1985) (60-day waiting period gives government opportunity to control course of litigation if it acts within 60 days).

This Court did not in any way suggest that the purpose of the waiting period was to maintain a non-adversarial period to encourage non-judicial resolution or to relieve any perceived burden that citizen suits place on

federal courts or the government. The only kind of government action that can stop a citizen suit is a civil enforcement proceeding filed in court. Thus, the Ninth Circuit's concern that a pragmatic interpretation of the notice requirement would not encourage non-judicial resolution misses the point. The statutory framework for RCRA and the other similar environmental statutes assumes that the only kind of non-judicial resolution of the conflict is if the violator brings itself into complete compliance within 60 days. Otherwise, the violator will face court action either by the government or by citizens acting as private attorneys general.

b. A Procedural Interpretation Is Consistent With *Middlesex*.

In *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court did not decide whether notice was a jurisdictional or procedural requirement for environmental citizen suits, nor did this Court discuss the purpose of the notice requirement. Instead, this Court limited its review to whether Congress intended to imply a private right of action independent of the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* The Court observed that FWPCA and MPRSA had "unusually elaborate enforcement provisions" that required compliance "with *specified procedures* – which respondents here ignored – including in most cases 60 days' prior notice to the potential defendants." 453 U.S. at 14 (emphasis added).

Although this Court did not decide whether the notice provision was jurisdictional or procedural, the language this Court chose, *i.e.*, "specified procedures," suggests that notice is a procedural, rather than a jurisdictional, requirement.

c. A Procedural Interpretation Is Consistent With *Zipes v. Trans World Airlines* And Its Progeny.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court held that a similar prefiling requirement was not a jurisdictional prerequisite. In that case, the question presented was whether the statutory time limit for filing charges with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1954, 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* was a jurisdictional prerequisite to a suit in district court. The court considered the statutory language, the legislative history, case law, the purpose of the filing requirement, and the remedial purpose of the legislation as a whole, and concluded that the filing requirement was not a jurisdictional prerequisite. Instead, this Court held that it was a requirement that was subject to waiver, estoppel, and equitable tolling:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

455 U.S. at 399.

5. The Notice Requirement Is Subject To Waiver, Estoppel, And Equitable Modification.

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), another Title VII case, this Court said that equitable tolling of the 90-day filing requirement after receipt of the right-to-sue letter might be appropriate "where the court has led the plaintiff to believe that she had done everything required of her." 466 U.S. at 152.

Here, the Hallstroms justifiably relied on the district court's decision that they need not dismiss and refile because they had "cured any defect by formally notifying the EPA and DEQ on March 2, 1983." J.A. at 57.

In *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211 (5th Cir. 1982), the Fifth Circuit held that receipt of a right-to-sue letter before filing a Title VII suit was a condition precedent subject to equitable modification. Specifically, the court held that receipt of a right-to-sue letter while an action was still pending "furthers the remedial purposes of the act without undermining the particular purpose of that requirement, to give the EEOC an opportunity to fulfill its function of investigating the charge in attempting conciliation." 678 F.2d at 1218.

In reaching that conclusion, the Fifth Circuit observed that allowing subsequent receipt of the right-to-sue letter to cure would probably not "encourage plaintiffs to attempt to bypass the administrative process because premature suits are subject to a motion to dismiss at any time before notice of the right to sue is received." *Id.* The court further observed:

> To distinguish such an action, once dismissed and then renewed, from an action where the defect is cured while the action remains pending is to distinguish between a glass half-full and a glass half-empty.

Id.

The court also based its decision on the "general policy of the law to find a way to prevent the loss of valuable rights, not because something was done too late, but rather because it was done too soon." *Id.*

The same reasons that supported *Pinkard*'s interpretation also support a procedural interpretation of the notice requirement at issue in this case. *See also Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965) (FELA statute of limitations tolled to effectuate Congressional purpose); *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) (commencement of class action tolls statute of limitations for class members who timely move to intervene after denial of class certification because purpose of statute of limitations served); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) (90-day statutory period for filing claims under Title VII suit was tolled during pendency of class action because purpose of statute of limitations served).

The reasoning used in *Zipes* and its progeny should also be used here. An interpretation that the notice requirement is subject to waiver, estoppel, and equitable modification or cure serves the particular purpose of the notice requirement as well as the general purpose of RCRA. Under the facts presented here, the requirement was either waived or subject to equitable modification or cure.

As noted above, the EPA and DEQ did not file an enforcement action in court against Tillamook County, and neither voiced any objection to not having received formal notice of the violation before the citizen suit was filed.

Although Tillamook County did not waive notice to the EPA and DEQ, it is doubtful that Congress intended it to have any standing to do so. Furthermore, Tillamook County has never demonstrated how it could have been prejudiced by the Hallstroms' failure to give notice to the government, and there is no indication how Tillamook County's conduct would have been any different.

Furthermore, this case presents circumstances justifying equitable modification of the notice requirement. The purpose of the notice was served by notice given after filing of the lawsuit. Trial began more than two years after formal notice was given to the government, and Tillamook County was not ordered to comply with RCRA until after trial. Furthermore, the Hallstroms justifiably relied on the district court's decision not to require dismissal and refiling. When the district court made its decision, *Garcia* and *Walls* had not yet been decided. Although the Seventh Circuit had decided *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976), that case was filed against the EPA before notice to the EPA had been given. In the case now before the Court, of course, neither the EPA nor DEQ are parties. Indeed, neither has sought to intervene.

6. The Failure To Give Notice To The Government Was Cured.

Finally, the Hallstroms' failure to give notice before the suit was filed was cured because formal notice was given to the government more than 60 days before trial.

This Court has long permitted parties to cure alleged jurisdictional defects. For example, when diversity jurisdiction was challenged because of a lack of complete diversity, it was held that this defect could be cured by plaintiffs' voluntary dismissal of the nonessential nondiverse parties. *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873); *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (Marshall, C.J.). In a similar context of Title VII cases, the circuit courts, with one arguable exception, have all held that the requirement of a right-to-sue letter before an action can be commenced can be cured as long as the right-to-sue letter is received before trial. *E.g., Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 n. 5 (3d Cir. 1984); *Hendersen v. Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1095 n. 13 (5th Cir. 1981); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1053-54 (9th Cir. 1988); *but see Gibson v. Croger Co.*, 506 F.2d 647 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975) (defect could be cured by amending complaint after receiving right-to-sue letter, or by refiling). This ability to cure is found even in those pre-*Zipes* opinions that appear to characterize the requirement of a right-to-sue letter as jurisdictional. *E.g., Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 (9th Cir. 1975).

In *Berg*, the court held that the "later issuance of the 'right to sue' letter coupled with a filing of the supplemental complaint operated to cure any initial jurisdictional defect." 528 F.2d at 1212. The court recognized that some courts consider the requirement to be jurisdictional, but that it was more of a "procedural nicety." The court said:

> True, such letters have often been characterized as a "jurisdictional prerequisite" to a lawsuit under Title VII. [Citation omitted.] However, we read the statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits.

528 F.2d at 1212.

Here, the failure to give notice was cured. Had the EPA or DEQ filed an enforcement action within 60 days of receiving formal notice, then the Hallstroms' citizen suit could have been dismissed, stayed, or consolidated. The EPA and DEQ, however, chose to do nothing and were content to allow the citizen suit to proceed. It would be an extreme elevation of form over substance and an "unreasonable result plainly at variance with the policy of [RCRA] as a whole" to require this successful citizen suit to be dismissed and then refiled.

CONCLUSION

The Hallstroms respectfully request this Court to reverse the decision of the Ninth Circuit and remand the

case to the circuit court for consideration of the other issues raised on appeal.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF

[redacted]

QUESTION PRESENTED

Is the 60-day notice requirement of the Resource Conservation and Recovery Act of 1976 ("RCRA") (42 U.S.C. § 6901 *et seq.*) a jurisdictional prerequisite to a citizen's suit [such as that filed by Petitioners ("the Hallstroms")] brought under the Act?

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No. 88-42

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RESPONDENT'S BRIEF

OPINION BELOW

The Amended Opinion of the Court of Appeals is reported at 844 F.2d 598 (1988). (J.A. 87-96)

STATUTE INVOLVED

The pertinent portion of RCRA involved in this matter (42 U.S.C. § 6972) is set forth in Appendix "A" to this Brief.

STATEMENT OF THE CASE

The Hallstroms own land near Respondent Tillamook County's ("the County") landfill. The County operates the landfill under a permit issued by the Oregon Department of Environmental Quality ("DEQ"). (J.A. 4, 11, 60, 61) Prior to April 1981, the Hallstroms became concerned that contaminated ground and surface water from the landfill was polluting their property. In April 1981, the Hallstroms sent a written notice to the County claiming violations of state and federal law and stating their intention to file a lawsuit. (J.A. 26-27, 38-39, 61)

In April 1982, the Hallstroms filed a lawsuit in federal court under the citizen-suit provision of RCRA Section 7002(a) [42 U.S.C. § 6972(a)]. The Hallstroms claimed violations of standards governing landfill operation established under RCRA and they also asserted pendent state claims for damages for inverse condemnation, trespass and nuisance. (J.A. 1, 3-10, 58-59, 61)

In their Complaint, the Hallstroms specifically alleged that "[m]ore than 60 days prior to the commencement of this action, plaintiffs served a notice of intent to file a citizen's suit pursuant to [RCRA]." (J.A. 5) However, in January 1983 the County learned that the Hallstroms had not given that required notice to either the

Environmental Protection Agency ("EPA") or to the DEQ as required by RCRA [42 U.S.C. § 6972(b)(1)]. (J.A. 22-25, 41) Consequently, the County moved for Summary Judgment and asked that the lawsuit be dismissed because of the Hallstroms' failure to give the required notice. (J.A. 1, 15) Immediately after receiving the County's Motion for Summary Judgment, and nearly one year after their lawsuit was filed, the Hallstroms gave notice for the first time to the EPA and DEQ.[1] (J.A. 27-28, 40-41, 61)

In April 1983, the district court denied the County's Motion for Summary Judgment. (J.A. 1, 56-57) Following a trial and the entry of a Final Judgment and Decree (J.A. 74-86), the Hallstroms appealed certain rulings made by

[1] The Hallstroms contend that "[f]or at least a year and a half before the Hallstroms filed this citizen suit, DEQ had actual knowledge of the violations and sent several enforcement letters to [the] County." (Op. Br. 7) The Hallstroms also quote from what they characterize as a "chronology that DEQ prepared." (Op. Br. 7-8) That "chronology" does not suggest, much less establish, that the DEQ or EPA had any notice that the Hallstroms intended to file a citizen suit under RCRA prior to the actual commencement of that action. (The "events" in the "chronology" do not relate to the Hallstroms' property at all but instead pertain to conditions at the County landfill and possible violations of the DEQ operating permit.) Indeed, the undisputed evidence is that neither the DEQ nor the EPA became aware of the alleged RCRA violations until after the Hallstroms had commenced this action. (J.A. 22-25, 27, 35-37) In any event, the Hallstroms have not asserted at any prior point in these proceedings that the DEQ and EPA had actual notice of alleged RCRA violations by the County prior to the commencement of the Hallstroms' citizen suit. The Hallstroms cannot make that argument for the first time before this Court. *See Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1785 n. 5 (1989).

the district court in connection with their RCRA claim and claims based on state law.[2] The County cross-appealed from the denial of its Motion for Summary Judgment. (J.A. 87)

The Court of Appeals reversed the ruling of the district court on the RCRA notice requirement and remanded the case to the district court to be dismissed. The Court of Appeals ruled that the RCRA 60-day notice requirement is a jurisdictional prerequisite to bringing a citizen suit under RCRA. Because the Hallstroms failed to notify the EPA and DEQ before filing their lawsuit, the Court of Appeals ruled that the district court lacked subject-matter jurisdiction to hear the lawsuit. (J.A. 87-96)

SUMMARY OF ARGUMENT

The Hallstroms asserted the existence of a federal question under RCRA as their basis for federal subject-matter jurisdiction. The provisions of RCRA that permit enforcement of that Act by private citizens specifically confer jurisdiction in the district courts. However, the same provisions require that the plaintiff-citizen must first give 60 days' advance notice of the intent to sue to

[2] As a result of the trial, the district court refused to grant the injunctive relief sought by the Hallstroms of permanent closure of the County landfill. Instead, the district court ordered the County to submit a proposal to ensure that all leachate generated by the landfill would be contained within the boundaries of the County landfill in the future. (J.A. 74-86) In addition, the jury found in favor of the County on the Hallstroms' state-law claims. (J.A. 75, 85-86)

the EPA and to the coordinate state agency responsible for enforcing RCRA. Citizen suits are prohibited until that requirement is met. It is undisputed that the 60-day notice required by RCRA was not given to the EPA and DEQ by the Hallstroms prior to commencing their lawsuit. Consequently, the district court lacked subject-matter jurisdiction over the lawsuit.

The RCRA notice provision does not provide, as the Hallstroms contend, that a citizen-plaintiff may file a RCRA claim and *then* give the proper notice so long as the court does not rule on the plaintiff's claim for 60 days. While such a statutory scheme *may* have been possible, that is not the scheme that Congress adopted.

Congress deliberately chose a hierarchy of preferred responses to a claimed RCRA violation: (1) voluntary compliance by the alleged violator, (2) enforcement action by the EPA or the coordinate state agency, and, only as a last resort, (3) a private lawsuit by a citizen-plaintiff. Congress consciously included the notice obligation in RCRA to implement that choice.

The RCRA notice requirement is not a mere procedural technicality, but an essential component of the overall statutory scheme. By requiring prior notice, Congress ensured that there would be a meaningful opportunity for voluntary compliance and agency enforcement *before* any private litigation is filed.

The Hallstroms' construction of RCRA would save their lawsuit from dismissal. However, it defeats a fundamental purpose of the legislation.

ARGUMENT

The failure of the Hallstroms to comply with the 60-day notice requirement in RCRA before filing their lawsuit deprived the district court of jurisdiction over the lawsuit.

Congress has authorized citizens to enforce RCRA standards through civil litigation since RCRA was originally enacted in 1976. A citizen-plaintiff, however, is required to give notice of intent to sue to the alleged violator of RCRA and to the federal and state environmental agencies at least 60 days prior to the commencement of the citizen's civil action. The citizen who commences an action without first satisfying the statutory requirements fails to properly invoke RCRA as a basis of federal subject-matter jurisdiction.[3]

Based on the plain, unambiguous language of the RCRA notice provision, underlying legislative history and the separation of powers doctrine, the Hallstroms' failure to comply with the 60-day notice requirement in

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[3] A citizen's failure to properly invoke RCRA as a basis of federal jurisdiction has no effect on other remedies available to the citizen. *See* 42 U.S.C. § 6972(f), which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator [of the EPA] or a State agency).

See, e.g., Parola v. Weinberger, 848 F.2d 956, 959 (9th Cir. 1988).

RCRA constituted a jurisdictional defect and compelled a dismissal of the Hallstroms' lawsuit.

A. The plain, unambiguous language of the RCRA notice provision prohibits the commencement of a citizen suit before the citizen has complied with explicit notice and waiting-period requirements.

The plain meaning of the RCRA 60-day notice requirement is clear. It is a jurisdictional prerequisite to the commencement of a citizen suit. It is not, as the Hallstroms and Amici[4] erroneously contend, merely a procedural requirement subject to equitable modification. The Hallstroms and Amici strain to argue that the RCRA notice requirement means something other than what it clearly says – a citizen suit is "prohibited" and cannot be commenced unless, at least 60 days prior to the commencement of the suit, the citizen-plaintiff has given notice of the claimed RCRA violations to the EPA and coordinate state agency.

1. The requirements for maintaining a citizen suit under RCRA are jurisdictional.

Significantly, the pertinent portion of the notice provision in RCRA is captioned "Actions prohibited"[5] and

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[4] Amici Curiae Sierra Club, Defenders of Wildlife, Inc., National Audubon Society, Natural Resources Defense Council, Inc., and the Wilderness Society ("Amici") filed an Amici Curiae Brief ("Am. Br.") with this Court in support of the Hallstroms.

[5] 42 U.S.C. § 6972(b).

states in unambiguous terms that "[n]o action may be commenced" until 60 days after the citizen notifies the EPA, the state in which the alleged violation occurs, and the alleged violator. 42 U.S.C. § 6972(b)(1). Under Fed. R. Civ. P. 3, "[a] civil action is commenced by filing a complaint with the court." Thus, read together, RCRA and Fed. R. Civ. P. 3 prohibit a citizen from "filing a complaint" until the notice and waiting-period requirements in RCRA have been satisfied.

A federal court has no subject-matter jurisdiction to act on any aspect of a lawsuit until a complaint has been filed and an action "commenced." Accordingly, Congress' explicit "prohibition" of the commencement of a citizen suit under RCRA prior to compliance with the statutory notice requirement demonstrates that Congress intended that requirement to have jurisdictional significance.[6]

2. The explicit language of the RCRA notice provision is controlling.

As the Hallstroms even acknowledge (Op. Br. 20), "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *accord Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 108 S. Ct. 376, 381 (1987). The plain, unambiguous language of a statute ordinarily must be regarded as conclusive. *See Burlington Northern v. Oklahoma Tax Comm.*, 481 U.S. 454, 461 (1987).

[6] The Hallstroms (Op. Br. 37) and Amici (Am. Br. 24-25) erroneously contend that the County lacks standing to assert the lack of subject-matter jurisdiction based on the absence of notice to the EPA and DEQ. That argument ignores this Court's recent decision in *U.S. Catholic Conference v. Abortion Rights*, ___ U.S. ___, 108 S. Ct. 2268, 2270-71 (1988), in which this Court held that courts have finite bounds of authority which are fixed by the limits of their jurisdiction and that even nonparties may object when those boundaries are crossed.

This Court has repeatedly recognized that when the terms of a statute are unambiguous, judicial inquiry generally is complete. *See e.g. Rubin v. United States*, 449 U.S. 424, 430 (1981). Indeed, this Court generally assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the statute's language. Accordingly, a literal reading of statutory language generally is the only proper reading. *See United States v. Locke*, 471 U.S. 84, 93-95 (1985).

The notice requirement in RCRA is unambiguous. A citizen suit is "prohibited" and may not be "commenced" until the citizen has satisfied the explicit notice requirements set forth in the Act. Congress could not have provided in clearer terms what steps a citizen must take before commencing a civil action under RCRA. The unequivocal clarity of the notice requirements in RCRA and other federal environmental statutes led the Court of Appeals in this matter to conclude that "[a]nything other than a literal interpretation of the 60-day notice requirement . . . would effectively render those provisions worthless." *Hallstrom v. Tillamook County*, 844 F.2d 598, 601 (1988).

The Court of Appeals in this matter correctly ruled that the 60-day notice requirement is jurisdictional based on the "plain language" of RCRA:

> [Senior Circuit] Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia [v. Cecos Intern., Inc.]*, 761 F.2d [76,] 78 [1st Cir. 1985]. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Hallstrom v. Tillamook County, supra, 844 F.2d at 600; *see also McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

This Court has not expressly interpreted the notice requirements of RCRA. However, in *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court ruled that the comprehensive enforcement provisions of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) and the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1401 *et seq.*) are intended to be exclusive and that the citizen-plaintiffs involved in that matter were not entitled to maintain any lawsuit or action under any legal theory except in the manner set forth in those statutes. 453 U.S. at 18. With respect to the jurisdictional character of the notice provisions in those statutes that are virtually identical to the notice provision in RCRA (*see* 453 U.S. at 6-7 n. 9), this Court ruled:

> These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures – which respondents here ignored – including in most cases 60 days' prior notice to potential defendants.

453 U.S. at 14 (footnote omitted).

This Court in *Middlesex* did not address the consequences of failing to give such notice. The Hallstroms, however, erroneously contend that "the language this Court chose, *i.e.*, 'specified procedures,' suggests that notice is a procedural, rather than a jurisdictional, requirement." (Op. Br. 34) The clear implication of *Middlesex* is that the notice requirements set forth in federal environmental statutes have jurisdictional significance and that citizen-plaintiffs who intend to maintain an action under those statutes must strictly comply with those requirements. Indeed, both the First Circuit in *Garcia v. Cecos Intern., Inc., supra*, 761 F.2d at 80, and the Sixth Circuit in *Walls v. Waste Resource Corp., supra*, 761 F.2d at 316-17, expressly stated that their respective rulings that the 60-day RCRA notice requirement is jurisdictional were consistent with the approach of this Court in *Middlesex*.

Those courts that allow a stay or otherwise attempt to remedy a citizen lawsuit not commenced in compliance with RCRA in effect sanction the maintenance of a federal lawsuit beyond the scope provided by Congress.[7] That

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[7] *See, e.g., Proffitt v. Commissioners, Bristol TP.*, 754 F.2d 504 (3d Cir. 1985); *Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A.*, 700 F.2d 459 (8th Cir. 1983); *Pymatuning Water Shed*

(Continued on following page)

approach has no support in the plain, unambiguous language of RCRA. Accordingly, there is no need to even look beyond RCRA's unambiguous terms to its legislative history. *See TVA v. Hill*, 437 U.S. 153, 184 n. 29 (1977), *citing, Ex Parte Collett*, 337 U.S. 55, 61 (1949).

3. The requirements of the RCRA notice provision are not subject to waiver, estoppel or other equitable modification.

The Hallstroms erroneously contend that this Court's decisions in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and its progeny suggest that the notice requirements established in RCRA and other federal environmental statutes should be interpreted flexibly and with regard to equitable considerations. (Op. Br. 34-37) In

(Continued from previous page)

Citizens Etc. v. Eaton, 644 F.2d 995 (3d Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977). (Op. Br. 24; Am. Br. 11-13, 16-18) Amici perceive in these cases "a willingness of the courts to respond to the exigencies of the case at hand and fashion a result that best serves the interests of justice." (Am. Br. 19) What Amici perceive, and apparently endorse, as result-oriented jurisprudence is in fact nothing more than the erroneous perception of certain courts that actual knowledge by the EPA and the coordinate state agency of a citizen-plaintiff's claim before the lawsuit is commenced amounts to substantial compliance with the RCRA notice requirement. That approach is inconsistent with the explicit provisions of the RCRA notice requirement and, in any event, has no relevance to this matter. Neither the EPA nor the DEQ in this matter had actual knowledge or formal, written notice of the Hallstroms' intent to sue under RCRA *before* the Hallstroms commenced their citizen suit.

Zipes, this Court held that the requirement of a timely filing of a charge of discrimination with the Equal Employment Opportunity Commission pursuant to 42 U.S.C. § 2000e-5(e) is not a jurisdictional prerequisite to a suit in district court. This Court reasoned that that time deadline, like a statute of limitation, was subject to equitable considerations such as waiver and tolling. 455 U.S. at 393.

In contrast, in this matter this Court is not confronted with statutory requirements that, like a statute of limitation, potentially raise an absolute bar to a party's right to pursue a remedy in federal court. A literal interpretation of the RCRA notice requirement at most will delay a citizen's right to sue under RCRA and, in fact, may entirely obviate the need to pursue an action if regulatory authorities are allowed the opportunity to resolve the dispute nonjudicially in the manner contemplated by Congress. Thus, equitable considerations offer no persuasive justification for ignoring the explicit prohibition by Congress on the commencement of actions by citizens prior to compliance with the RCRA notice requirement. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-50 (1984) [declining to depart from or modify Fed. R. Civ. P. 3 in determining when an action is "commenced" under 42 U.S.C. § 2000e-5(f)].

In any event, the Hallstroms erroneously contend that, "[u]nder the facts [of this matter], the [60-day notice] requirement was either waived or subject to equitable modification or cure." (Op. Br. 36) Even if the lack of jurisdiction could somehow be waived, the County clearly did not waive anything. The County filed its Motion for Summary Judgment on the jurisdictional issue

immediately after it discovered that, contrary to the allegations in the Hallstroms' Complaint, the Hallstroms had not given notice as required by RCRA. In addition, the County carefully preserved that issue before the district court and raised it on cross-appeal. Thus, there has been no waiver of that issue by the County and the County should not be deemed to be estopped from asserting that jurisdictional defect. Neither should any action or inaction on the part of EPA or DEQ constitute waiver or estoppel, as neither agency was a party to the Hallstroms' lawsuit and neither can waive the jurisdictional requirement or estop the County.

B. The legislative history underlying RCRA and other federal environmental statutes confirms the clear meaning of the statutory requirements for commencing a citizen suit.

Even if this Court chooses to consider the legislative history underlying RCRA and other federal environmental statutes, that history clearly shows that the notice requirement is an intentional and integral part of the overall statutory scheme established by Congress. Nothing in that legislative history justifies disregard of the plain, unambiguous language used by Congress in the RCRA notice provision.

1. Congress' intention was to establish a hierarchy of preferred responses, and the notice requirement is a key element in achieving that goal.

Both sides and Amici agree that "the court should interpret the statute [RCRA] to carry into effect the end

Congress wanted to accomplish." (Op. Br. 28) The County certainly does not disagree with the Hallstroms and Amici that citizen-suit provisions were enacted "to encourage citizen participation in the enforcement of environmental legislation *as a supplement to agency enforcement*." (Am. Br. 6, emphasis added) However, the legislative history clearly evidences Congress' intent to establish a three-tier hierarchy for responding to alleged environmental violations: (1) voluntary compliance by the violator after having received the requisite 60-day notice, (2) government enforcement action against the violator [*see* 42 U.S.C. § 6972(b)(2)], and (3) a citizen suit against the violator only *after* the requisite notice has been given, 60 days have expired, and there has been no voluntary compliance or governmental agency action commenced.

The legislative history (even that relied on by the Hallstroms and Amici) makes it clear that the third tier or alternative – the citizen suit – is the *least* preferred of the three tiers or alternatives and cannot be utilized unless and until the other two tiers or alternatives have first been exhausted:

> (1) *Voluntary compliance*
>
> Notice to the violator gives him a chance to bring himself into complete compliance in 60 days. If the violator comes into complete compliance in 60 days and it is absolutely clear that the violation cannot reasonably be expected to recur, then the citizen suit is unnecessary. (Op. Br. 13)

This Court recently recognized that one purpose of a citizen-suit notice provision is to give the alleged violator "an opportunity to bring itself into complete compliance

with the [law] and thus likewise render unnecessary a citizen suit." *Gwaltney of Smithfield v. Chesapeake Bay Found., supra,* 108 S. Ct. at 382-83.

(2) *Government enforcement action*

> Notice of the violation to the government should trigger government action. The Senate Committee Report on the Clean Air Amendments said:
>
> > In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State air pollution control agency and the alleged polluter.
>
> 116 Cong. Rec. 32,926 (1970).[8] (Op. Br. 13-14)

As Amici aptly state: "Committee members believed that the notice provision would serve to trigger administrative action to remedy the alleged violation, thereby eliminating the need for the private citizen to seek relief in the courts." (Am. Br. 9-10)

[8] It is significant that this legislative history refers to a "notice of intent to file such action." This legislative history is consistent with Regulations promulgated by the EPA. Those Regulations (40 C.F.R. § 254; *see* Op. Br. 4) are included in Appendix "B" to this Brief and explicitly require "notice of intent to file suit," which is how the Hallstroms characterized their notice.

(3) *Citizen suit*

The legislative history that Amici rely on [S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (report of Public Works Committee)] makes it clear that Congress anticipated that government agencies, federal and state, would be "primarily responsible for enforcement" and that private citizens "were encouraged to uncover violations that otherwise might escape notice, and motivate the agencies to take action." (Am. Br. 8) That same legislative history makes it clear that it is only when the government agencies fail to act that citizens should be able to bring their enforcement actions in the form of citizen suits.

However, as Amici correctly note, those federal courts that have considered the notice requirements in the Clean Air Act Amendments and other federal environmental statutes "have consistently recognized that Congress sought to facilitate and encourage citizen involvement while preserving the *primary enforcement role* of the federal and state regulatory agencies and shielding the federal courts from an unmanageable number of citizen suits." (Am. Br. 11, emphasis added) Thus, as Amici even acknowledge, "Congress intended to provide for citizen suits in a manner least likely to clog the courts and most likely to trigger agency enforcement." (*Id.*)

There is nothing in RCRA or in the underlying legislative history that implies that a citizen may resort to a court without first satisfying the explicit notice requirement or that a citizen who has not satisfied the notice requirement may nevertheless commence a lawsuit under RCRA and ask the court to hold the action in abeyance in order for the citizen to comply with the 60-day notice requirement. A citizen (like the Hallstroms) who commences a lawsuit before providing the requisite notice

frustrates the primary and underlying objectives of accomplishing voluntary compliance, triggering appropriate administrative action to remedy the alleged violation, and avoiding unnecessary civil litigation. Indeed, the Court of Appeals in this matter concluded that its ruling serves "the underlying policy aims of encouraging non-judicial resolution of environmental conflicts":

> [O]nce a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, [*supra*,] 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty-day nonadversarial period to the parties." *Id.*
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> . . . . .
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> . . . [I]f a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Hallstrom v. Tillamook County, supra, 844 F.2d at 601.

2. The legislative history underlying RCRA and other environmental statutes demonstrates that the notice requirements were intended to be applied literally.

The citizen-suit provision in RCRA was modeled on the analogous provision in the Clean Air Act Amend-

ments.[9] The legislative history underlying the Clear Air Act provision shows that Congress intended the notice provision to play a significant role. Even proponents of citizen participation in connection with the Clean Air Act were concerned that private-enforcement lawsuits could interfere with the enforcement responsibilities delegated to governmental authorities. *See Hearings on S.3229, S.3466 and S.3546 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 91st Cong., 2d Sess. 1184 (1970). Opponents of citizen enforcement were concerned that citizen lawsuits would foster unproductive adversary relations between public, business and private factions. *Id.* at 1570. The 60-day notice requirement was intended to reconcile those concerns with the perception that citizens and government authorities working together could more effectively resolve environmental disputes than through immediate resort by citizens to the courts. *See* 116 Cong. Rec. 32,381 (1970).

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[9] 42 U.S.C. § 7604(b)(1). *See also* Section 505(b)(1) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(b)(1); Section 310(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9659(d)(1); Section 16(b)(1) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(b)(1); Section 11(g)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2); Section 105(g)(2) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(2); Section 12(b)(1) of the Noise Control Act of 1972, 42 U.S.C. 4911(b)(1); Section 23(a)(2) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(2); Section 1449(b)(1) of the Safe Drinking Water Amendments of 1977, 42 U.S.C. 300j-8(b)(1); Section 520(b)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(b)(1); Section 20(b)(1) of the Toxic Substances Control Act, 15 U.S.C. 2619(b)(1); Section 11(b)(1) of an Act to Prevent Pollution from Ships, 33 U.S.C. 1910(b)(1).

Based on its review of the underlying legislative history, the Court of Appeals correctly concluded in this matter that "[n]on-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed" and that "[l]itigation should be a last resort only after other efforts have failed":

> Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. *Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA.* The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong. Rec. 32,927 (1970).

Hallstrom v. Tillamook County, supra, 844 F.2d at 601 (emphasis added); *accord Walls v. Waste Resource Corp., supra,* 761 F.2d at 317 ("the legislative history shows that far from being a mere formality, prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit").

The legislative history does not suggest, much less establish, persuasive grounds to disregard the statutory prohibition against a citizen's commencement of a lawsuit before complying with explicit notice requirements. The comments of one sponsor of the Bill that became the Clean Air Act citizen-suit provision capture the intent of the legislation's proponents to allow citizen participation *only after* notice has been given and government enforcement mechanisms have had an opportunity to respond:

> [B]efore any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind. In other words, the idea is to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not respond, then the citizen has his right to go to court.

116 Cong. Rec. 33,103 (1970) (remarks of Senator Muskie), cited in *Hallstrom v. Tillamook County, supra,* 844 F.2d at 601.

3. Congressional amendments to RCRA support the conclusion that the notice requirement may not be waived or otherwise satisfied after commencement of a citizen suit.

Congress amended the RCRA citizen-suit provision in 1984 (after the Hallstroms' lawsuit was filed) to extend to citizens the right to sue immediately after giving notice where the perceived threat involves RCRA hazardous waste management standards.[10]

Congress did not alter the 60-day notice requirement where, as here, a citizen sues in regard to the solid waste provisions of RCRA. Congress' deliberate choice in 1984 to modify some, but not all, prerequisites applicable to

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[10] 42 U.S.C. § 6972(b)(1) was amended in 1984 (over two years after this lawsuit was filed) to provide for an exception that waives the 60-day notice requirement if the alleged violation involves hazardous waste. That amendment, however, does not apply to this matter. (J.A. 3, 35-36, 60-62, 67-68) *See, also, Hallstrom v. Tillamook County, supra,* 844 F.2d at 600-01 ("[t]his provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste").

RCRA citizen suits is further proof that Congress intended the other terms of the RCRA citizen-suit provision to remain intact as originally and literally enacted.

This Court has cautioned that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982), *quoting Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977). In this matter, no reason exists for this Court to even consider the legislative history underlying the plain, unambiguous language of the RCRA citizen-suit provision. However, even if this unnecessary step is taken, nothing in the legislative history indicates congressional intent demonstrably at odds with Congress' chosen statutory language.

C. Federal courts may not deviate from explicit statutory requirements established by Congress.

To ignore the plain, unambiguous language of the RCRA notice requirement or even the underlying legislative history in order to construe RCRA in a manner asserted by the Hallstroms and Amici would be to take this Court "out of the realm of interpretation and place [it] in the domain of legislation." *U.S. v. Locke, supra*, 471 U.S. at 96. Moreover, the constitutional structure of our government prohibits the federal courts from assuming that role.

1. The explicit requirements of the RCRA notice provision must be literally applied regardless of the effect on the Hallstroms' lawsuit.

The plain, unambiguous language of and legislative history underlying the RCRA notice requirement are clear. The consequence of the Hallstroms' failure to comply with that requirement should not be mitigated by reading into RCRA a degree of flexibility that simply is not present in the statutory language chosen by Congress. Indeed, strict adherence to the procedural requirements established by Congress has proven to be the best guarantee of evenhanded administration of the law. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

The Hallstroms and Amici suggest that a literal interpretation of the RCRA notice requirement will have a detrimental effect on the ability of citizens to enforce federal environmental laws. However, if a literal interpretation of the RCRA notice requirement leads to a harsh result,[11] the harshness "is imposed by the legisla-

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[11] Amici focus on the Endangered Species Act as a "striking example of the absurd and harsh results of a formalistic jurisdictional rule." (Am. Br. 26-30) According to Amici, inflexible enforcement of the 60-day waiting period could result in the extinction of an endangered species that might have been avoided had a district court possessed the authority to waive or modify the waiting requirement. (Am. Br. 29). That argument, however, fails to take into account that the Endangered Species Act, like RCRA, does not purport to preempt other remedies that may be available to a particular citizen. *See* 16 U.S.C. § 1540(g)(5); 42 U.S.C. § 6972(f). Thus, the imposition of a 60-day waiting period for purposes of the Endangered Species Act does not affect a citizen's ability to invoke other statutory or common-law procedures for seeking immediate relief.

ture and not by the judicial process." *See Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405, 2409 (1988) (holding that specification of parties in a notice of appeal is a jurisdictional prerequisite), *quoting Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). Indeed, this Court has recognized that statutory procedures established by Congress for gaining access to the federal courts are not to be disregarded by the courts out of sympathy for particular litigants. *See Baldwin County Welcome Center v. Brown*, *supra* 466 U.S. at 152.

2. Congress, not the federal courts, is constitutionally empowered to define the circumstances under which a citizen may sue to enforce federal environmental statutes.

The Hallstroms and Amici essentially ask this Court to rewrite the RCRA notice requirement and thereby legislate in a manner reserved to Congress by Article I of the Constitution. This Court has repeatedly rejected arguments that would require it to extend its constitutionally-assigned role. For example, in *TVA v. Hill*, *supra*, several environmental groups brought an action under the Endangered Species Act of 1973 to enjoin the Tennessee Valley Authority from completing the Tellico Dam. The environmental groups argued that completion of the Dam would eradicate an endangered species of snail darter or destroy its critical habitat. This Court held that the Endangered Species Act prohibited further work on the Dam even though the Dam was virtually complete and Congress continued to appropriate public funds toward the project after being apprised of the Dam's probable impact on the snail darter's survival. 437 U.S. at 171-95.

Significantly, this Court in *TVA v. Hill* refused to ignore the statute's plain language even though its literal application would terminate the Tellico Dam project and sacrifice millions of dollars in public funds. In affirming the entry of an Order directing the district court to permanently enjoin further work on the project, this Court reasoned:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), it is equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
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> . . . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

437 U.S. at 194-95; *see also Mohasco Corp. v. Silver, supra,* 447 U.S. at 826 (courts may not "alter the balance struck by Congress" by favoring one side or another in matters of statutory construction).

This Court's decision in *TVA v. Hill* reflects nothing less than "a profound respect for the law and the proper allocation of lawmaking responsibilities in our Government." *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 334-35 (1982) (Stevens, J., dissenting, footnote omitted). That respect also should lead this Court to reject the argument of the Hallstroms and Amici that Congress meant something other than what it enacted in the RCRA notice provision. The literal terms and the underlying legislative history of that provision simply do not authorize a stay or any other judicial effort to remedy a citizen suit commenced before the statutory notice requirement has been met. Articles I-III of the Constitution and the separation of powers doctrine prevent this Court from reaching a contrary result.

CONCLUSION

This Court should affirm the decision of the Court of Appeals and the case should be remanded to the district court for dismissal.

Respectfully submitted,

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APPENDICES

APPENDIX A

Section 7002 of the Resource Conservation and Recovery Act of 1976, 90 Stat. 2825, 42 U.S.C. § 6972 (1982 ed., Supp. III)

§ 6972. Citizens suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(l) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order; *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

APPENDIX B

EPA Regulations on Prior Notice of Citizen Suits under RCRA, 40 C.F.R. § 254

PART 254 - PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

§ 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

§ 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged

violator of any permit, standard, regulation, condition, requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been

violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice.

(c) *Identification of counsel.* The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY, a municipal corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

1. The Hallstroms agree that notice is a requirement, but do not agree that notice is a jurisdictional requirement that can never be subject to cure, waiver, estoppel, or equitable modification.

There is no issue that the citizen suit provisions of the Resource Conservation and Recovery Act, § 7002 (a) and (b), 90 Stat. 2825, 42 U.S.C. § 6972(a) and (b) (1982 ed. & Supp. III) ("RCRA") require notice before commencement of a citizen suit. The question presented is whether

lack of notice to the government before commencement requires dismissal and immediate refiling.

The question is not answered by the text of the statute because the statute does not describe notice as a jurisdictional requirement nor does it require dismissal and refiling.

Furthermore, interpreting notice as a jurisdictional requirement would lead, in this case and in other cases, to a futile result plainly at variance with (1) the purpose and policy of the statute as a whole and (2) this Court's decisions on similar prelitigation requirements. *E.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (stay during prelitigation waiting period preferable to dismissal with leave to refile); *Newman-Green, Inc. v. Alfonzo-Larrain*, ___ U.S. ___, 109 S.Ct. 2218 (June 12, 1989) (jumping through "judicial hoops" of dismissal and refiling is not required because appellate court has power to dismiss dispensable nondiverse party).

2. Tillamook County and the Solicitor General have ignored the factual context of this case because it shows why a jurisdictional interpretation would defeat the purpose of the statute as a whole.

In presenting their argument that notice is a requirement, therefore it must be a *jurisdictional* requirement,[1] Tillamook County and the Solicitor General ignore several concrete facts.

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[1] It is ironic that Tillamook County and the Solicitor General ask this Court to impose a bright line jurisdictional inter-

(Continued on following page)

First, the Hallstroms acted as private attorneys general with no hope of recovering damages under the Act. They took the case to trial, spent $95,000, and eventually, after years of litigation, obtained an injunction against Tillamook County for the protection of the environment. Under similar circumstances, this Court unanimously rejected the request of a civil rights violator to interpret a statutory attorney fee provision against a private attorney general. The Court based its decision in part on the important role that a private attorney general plays in protecting the interests of the Nation:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered the highest priority.

Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1967) (case brought to enforce Title II of the Civil Rights Act of 1964, § 204(a), 78 Stat. 244, 42 U.S.C. § 2000a-3(a)) (citations and footnotes omitted).

Second, the Hallstroms justifiably relied on the district court's decision that they had cured any defect by

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(Continued from previous page)

pretation of the 60 day notice requirement when Tillamook County and the Solicitor General failed to comply with the 15 day time requirement of Supreme Court Rule 38.4 when they moved for leave for the Solicitor General to present oral argument.

formally notifying the Environmental Protection Agency ("EPA") and the Oregon Department of Environmental Quality ("DEQ") after the case was filed. J.A. 57. The Hallstroms could have dismissed the case and refiled it nine days after the district court's decision. They did not do so because the district court led them to believe that they had done everything required of them. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (in Title VII case, equitable tolling of statutory prelitigation requirement might be appropriate "where court has led the plaintiff to believe that she had done everything required of her").

Third, Tillamook County did not voluntarily comply with the Act even though it had been given formal written notice of the violation nearly a year before the case was filed. Tillamook County has not suggested that it was in any way prejudiced by the lack of notice to DEQ and EPA, nor has Tillamook County shown any way that its conduct would have differed if notice had been given.

Fourth, DEQ had actual notice that Tillamook County was in violation of RCRA for at least a year and a half before the Hallstroms filed this citizen's suit so further notice would have served no purpose.[2]

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[2] In its brief, Tillamook County urges this Court not to consider the fact that DEQ had actual notice of the violation before the citizen's suit was filed because it was not argued below. Resp. Br. at 3, n. 1. This Court should not close its eyes to DEQ's actual notice for several reasons. First, DEQ's actual notice of the violation is a fact, not an argument or a new issue. Second, it is a fact that is fairly comprised within the issue

(Continued on following page)

Fifth, DEQ and EPA did not begin an administrative action nor issue any administrative order after receiving notice of the violation and of the pending citizen's suit.[3]

Sixth, DEQ and EPA did not file any enforcement action in court after receiving notice of the violation or notice that the citizen's suit had been filed. *See* § 7002(b)(2), 42 U.S.C. § 6972(b)(2) (the citizen's suit may not be commenced if the EPA or the state has commenced and is diligently prosecuting an enforcement action in federal or state court).

(Continued from previous page)

presented by the petition for certiorari. *E.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Third, *Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S.Ct. 1775, 1785, n. 5 (1989) does not support Tillamook County's position. The question presented there concerned the respective burdens of proof of the parties in a Title VII suit. This Court declined to consider an unrelated and newly raised issue whether the employer had subjected the employee "to a biased decisionmaking process that 'tended to deprive a woman of a partnership on the basis of her sex.' " *Id.* That issue was not fairly comprised within the issue of burden of proof presented in the petition for certiorari. In contrast, DEQ's actual notice of the violation, and its subsequent inaction, bears on whether the notice requirement is subject to cure or equitable modification under appropriate circumstances because DEQ's actual notice is a circumstance that should be considered.

[3] Under RCRA, only DEQ, not the EPA, has authority to initiate an administrative proceeding to enforce compliance with the Solid Waste Subchapter, §§ 4001-4009, 42 U.S.C. §§ 6941-6949. In his brief, the Solicitor General erroneously argues that EPA has this administrative authority. Amicus Br. at 1, n. 1. The part of RCRA that the Solicitor General relies on, however, refers only to violations of the Hazardous Waste Subchapter, §§ 3001-3013, 42 U.S.C. §§ 6921-6934.

Seventh, neither DEQ nor EPA sought to intervene even though they had a right to do so. Section 7002(b), 42 U.S.C. § 6972(b), as amended in 1984, provides in pertinent part, "In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right." Similarly, § 7002(d), 42 U.S.C. § 6972(d), provides, "In any action under this section, the Administrator, if not a party, may intervene as a matter of right."

Finally, the case went to trial in July 1985, two years after formal notice. At no time, either before or after trial, has DEQ or EPA voiced any objection to being notified after the citizen's suit was filed instead of before.

3. The text of the statute does not resolve the question whether lack of notice to the government requires dismissal and refiling.

The text of the statute provides that notice is a requirement, but it does not say that lack of notice to the government, when notice was given to the violator, requires dismissal and refiling. The provision of the statute that grants jurisdiction to the district courts does not limit jurisdiction to cases where notice was given. Congress could have chosen to make notice a jurisdictional requirement, but it did not do so. This Court should decline the invitation of Tillamook County, an adjudicated violator of RCRA, to amend the citizen's suit provisions to make notice a jurisdictional, rather than a procedural, requirement.

This principle was applied in *Finley v. U.S.*, ___ U.S. ___, 109 S. Ct. 2003 (1989), Justice Scalia observed that the

text of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), did not confer jurisdiction over "pendent party" claims:

> The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States" – formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

Id. at 2008.

The Solicitor General argues that the word "jurisdictional" is not necessary and cites *Teague v. Regional Comm'r of Customs, Region II*, 394 U.S. 977 (1969). *Teague*, however, is not an opinion of this Court. Rather, it is an opinion written by Justice Black and joined by Justice Douglas in dissent to a decision to deny certiorari.

In support of its argument that this Court must interpret the notice requirement as jurisdictional, Tillamook County cites *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988), in which this Court held that a federal appellate court does not have jurisdiction over a party who is not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c). Tillamook County neglected to mention, however, that this Court relied for its conclusion on the views of the Advisory Committee that "the timely filing of a notice of appeal is 'mandatory and jurisdictional'. . . ." *Id.* at 2408.

4. Although notice is required, dismissal and refiling are not. A stay is all that is needed.

A jurisdictional interpretation in this case would require a futile result, *i.e.*, dismissal and immediate refiling. When confronted with the same question in a different contexts, this Court has held that the futile act of dismissal and refiling is not necessary, and that a stay would be sufficient.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court was asked to decide whether (1) the Age Discrimination in Employment Act of 1967, 81 Stat. 607, 29 U.S.C. § 633, required the claimant to resort first to state agencies before bringing an enforcement action in federal court, and (2) if so, what were the consequences of a failure to do so. The Court first held that resort to state agencies was indeed a "mandatory" requirement. The Court then held that the federal court action should be stayed, rather than dismissed with leave to refile, while the claimant filed a complaint with the state agencies:

> We therefore hold that respondent may yet comply with the requirements of § 14b by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile, the federal suit should be held in abeyance.

Id. at 765. In a footnote, this Court specifically addressed the question whether a stay, rather than dismissal, is preferable:

> Suspension of proceedings is preferable to dismissal with leave to refile. Respondent's timely complaint has already satisfied the requirements of 29 U.S.C. § 626(e), "to require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." For this reason suspension pending deferral is the preferred practice in the federal courts.

Id. at 766 n. 13 (citations omitted).

This Court most recently held that a dismissal and refiling would not be required in the context of diversity jurisdiction. In *Newman-Green, Inc. v. Alfonzo-Larrain*, ___ U.S. ___, 109 S. Ct. 2218 (June 12, 1989), the Court held that a court of appeals has the authority to grant a motion to dismiss a dispensable nondiverse party:

> We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. . . . If the entire suit were dismissed, Newman-Green would simply refile in the District Court against the Venezuelan corporation and the four Venezuelans and submit the discovery material already in hand. The case would then proceed to a preordained judgment. Newman-Green should not be compelled to jump through these judicial hoops merely for the sake of jurisdictional purity.

Id. at 2225.

Oscar Mayer and *Newman-Green* are in accord with the long standing principle that equity does not compel a useless or futile formality. *E.g., Merchants Nat. Bank v. H.L.C. Enterprises*, 441 N.E.2d 509, 514 (Ind. App. 1982) (special notice of default to the guarantor of a corporation's debt was not required when the guarantor was one

of two officers and shareholders of the corporation because "[e]quity should not and will not require the performance of a useless formality."); *Carpenter v. Riley*, 675 P.2d 900, 904 (Kan. 1984) (after plaintiffs' refusal to accept defendant's tender in 1981, defendant was no longer required to tender future installment payments into court because tender would serve no purpose, tender would be a mere formality, and equity does not insist on purposeless conduct and disregards mere formality).

Tillamook County's attempt to distinguish *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) misses the point. First, the requirement in *Zipes* was prelitigation requirement, just as notice is a prelitigation requirement. Second, this case went to trial and has been in litigation for years, so more is at stake than delay for 60 days. Third, the 60 day waiting period is just enough time for the government to decide whether to file an enforcement action; it is not enough time to seek nonjudicial resolution. Nothing in the statute or the legislative history suggests a purpose of nonjudicial resolution. Fourth, the principle that dismissal and refiling is excessively formalistic applies to this case just as it did in *Zipes*, *Oscar Mayer*, and *Newman-Green*.

Similarly, the Solicitor General misstates, rather than discusses, the principle applied in *Zipes*. The Hallstroms did not argue, and this Court did not say in *Zipes*, that the district court has unfettered discretion to disregard the filing requirements of Title VII. The Hallstroms did argue, and this Court did say, that the time limit for filing charges with the Equal Employment Opportunity Commission was not a jurisdictional requirement, and therefore, it was subject to waiver, estoppel, and equitable

modification. *Zipes* was reaffirmed in *Lorance v. AT&T Technologies, Inc.*, ___ U.S. ___, 109 S. Ct. 2261, 2268 (June 12, 1989) (limitations period for Title VII action based on facially neutral seniority system begins to run from adoption of the system, not when impact of system is felt by individual).

5. The question presented is resolved by interpretation of the statute, which is a proper function of this Court.

When the text of the statute does not answer the question, or when a literal application of the naked text would produce an "odd result," *Green v. Bock Laundry Machine Co.*, 490 U.S. ___, 109 S. Ct. 1981, 1984 (1989), or " 'patently absurd consequences' that 'Congress could not *possibly* have intended,' " *Public Citizen v. Department of Justice*, ___ U.S. ___, 109 S. Ct. ___ (1989) (Kennedy, J. concurring), or "an unreasonable [result] 'plainly at variance with the policy of the legislation as a whole,' " *U.S. v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543 (1940), it is appropriate to look to evidence of Congressional intent and purpose. Here, the legislative history does not address the question whether the notice requirement is a *per se* rule that is always to be applied regardless of the circumstances. However, the legislative history does place the notice requirement in the context of the purpose of the statute as a whole. It does say that once the government has had time to decide whether to act, a citizen's suit is proper. That is exactly what happened here.

The Hallstroms do not ask this Court to rewrite RCRA. The Hallstroms do not ask this Court to say that notice is not a requirement. Instead, the Hallstroms ask this Court to interpret the notice provision to avoid futile, absurd, and unreasonable results plainly at variance with the purpose and policy of the statute as a whole.

As noted in the opening brief, a jurisdictional interpretation will lead to absurd or unreasonable results plainly at variance with the purpose and policy of the statute as a whole. Additional examples of absurd results that were avoided by an interpretation that did not require dismissal and refiling are found in *Student Public Interest v. AT&T Bell Lab.*, 617 F. Supp. 1190 (D. N.J. 1985) and *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D. R.I. 1977).

In *Student Public Interest*, two environmental groups brought an action against AT&T Bell Laboratories for violation of the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365. One of the environmental groups, but not the other, gave notice to the defendant. The defendant moved to preclude the environmental group that had not given notice from participating in the suit. The district court denied the motion and held that the failure of one environmental group to give notice did not deprive the district court of subject matter jurisdiction.

In *Save Our Sound*, a citizen group brought an action against the Army Corps of Engineers under the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365, and the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415(g)(1) to enjoin the

dumping of dredged material at a specific location. The court observed that the plaintiff had a long-standing concern and had notified the Corps of that concern well in advance of filing the citizen's suit. Thereafter, apparently to sidestep the plaintiff's challenge to the project, the Corps took illegal shortcuts for awarding the dredging contract. Upon learning that the project was about to begin, plaintiff filed a formal notice and then commenced its citizen's suit six days later. The district court observed that the plaintiff would have had time to comply with the 60 day waiting period if the Corps had complied with statutory requirements:

> Under the government's view of the case, although plaintiff would have been able to comply with the requisite notice precedent to filing a citizen's suit had the Corps complied with NEPA, FWPCA, and MPRSA, the Corps' violation of these three important statutes effectively removed plaintiff's opportunity to maintain a citizen's suit under the Acts, until the damage sought to be avoided would have been largely accomplished. This Court cannot sanction such a transparent attempt to undermine Congressional policies and intention.

Id. at 1144. Accordingly, the district court held that, "in the narrow circumstances here presented," plaintiff's expression of interest in the dredging project constructively satisfied the 60 day notice requirement. Although *Save Our Sound* does not speak in terms of equitable modification, that is exactly what happened. This is particularly noteworthy because the district court in that case had obviously struggled with the impossibility of reconciling a jurisdictional interpretation to Congress' intention.

This Court has the authority to say what the law is, *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and it has authority to look behind the words of the statute to the purpose the words were written to accomplish. The purpose of statutory interpretation is to accomplish the objective of Congress. On occasion, an interpretation contrary to a superficial, unflective, or wooden reading of the statute is necessary to accomplish the objective of Congress. To adhere to an interpretation that would lead to an absurd result or a result plainly at variance with the purpose and policy of the statute as a whole would be to enter the realm of legislation. The Court enters the realm of legislation when it interprets a statute in a way that defeats the accomplishment of Congress's purpose.

This Court most recently spoke on the process of statutory interpretation in *Public Citizen v. Department of Justice*, ___ U.S. ___, 109 S. Ct. ___ (1989):

> Even though, as Judge Learned Hand said, "The words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (CA 2), aff'd, 326 U.S. 404 (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

As Justice Kennedy noted in his concurring opinion to *Public Citizen*, the process of statutory interpretation, even an interpretation that departs from the literal words of the statute, is appropriate when a literal interpretation would lead to absurd consequences:

> When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the co-equal Legislative Branch, which we assume would not act in an absurd way.

109 S. Ct. at ___.

6. The 1984 Amendments to RCRA do not resolve the question whether lack of notice to the government requires dismissal and refiling.

In 1984, Congress amended the citizen's suit provision of RCRA in three important aspects. First, Congress extended the reach of citizen's suits to practices that "may present an imminent and substantial endangerment to health or the environment." Section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). Before this amendment, only the EPA could bring such an enforcement action. Section 7003(a), 42 U.S.C. § 6973(a). Second, Congress provided for intervention in a citizen's suit to compel compliance with RCRA by "any person" "as a matter of right." Section 7002(b), 42 U.S.C. § 6972(b). These two amendments demonstrate Congress' confidence in citizen enforcement.

The third amendment provided that notice, but not the 60 day waiting period, is required when a hazardous

waste violation is alleged. The amendment to § 7002(b), 42 U.S.C. § 6972(b), provides:

> except that such action [to compel compliance with RCRA] may be brought *immediately after such notification* [of the violation to the Administrator, the State, and to any alleged violator] in the case of an action under this section respecting a violation of subchapter III [Hazardous Waste Management] of this chapter;. . . .

Thus, the 1984 amendments do not eliminate notice as a prelitigation requirement in a citizen's suit brought to eliminate a hazardous waste violation. The question whether lack of notice to the government (when notice was given to the violator) would require dismissal and refiling still remains.

For example, what would happen if a hazardous waste citizen's suit were commenced immediately before notice were given to the EPA, DEQ, and the alleged violator? Under a jurisdictional interpretation, the case would have to be dismissed and refiled. Similarly, what would happen if a hazardous waste citizen's suit were filed without giving notice to the EPA and DEQ when those agencies already had actual notice of the hazardous waste violation and had previously indicated to the citizen that they did not have the time or money to bring an enforcement action of their own? Under a jurisdictional interpretation, the case would have to be dismissed and refiled even if the violator had been given notice.

Incidentally, when the 1984 amendments were enacted, of the five circuits that had addressed the question presented in this case, only one had held that notice was a jurisdictional requirement. *Garcia v. Cecos Intern.*,

Inc., 761 F.2d 76 (1st Cir. 1985) and *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the cases the Ninth Circuit mainly relied on, had not yet been decided. The legislative history to the 1984 amendments shows that the House Committee was aware of case law in the area, and specifically discussed the misinterpretation of § 4005(a), 42 U.S.C. § 6945(a) by a federal district court in Texas, *City of Gallatin v. Cherokee County*, 563 F. Supp. 940 (E.D. Tex. 1983). H. Rep. 98-198, Part I, 98 Cong., *reprinted in* [1984] U.S. Code. Cong. & Ad. News 5612-13. The House Committee did not discuss whether the Second, Third, Eighth, and District of Columbia Circuits were correct in interpreting the notice provision as not requiring dismissal, or whether the Seventh Circuit was correct in interpreting the notice requirement as jurisdictional.[4]

CONCLUSION

The text of the statute does not compel an interpretation that notice is a jurisdictional requirement. Even if it

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[4] *Natural Resources Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975) (dismissal not required); *Susquehanna Valley Alliance v. Three-Mile Island*, 619 F.2d 231, 243 (3d Cir. 1980) (dismissal and refiling not required), *cert. denied*, 449 U.S. 1096 (1981); *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983) (dismissal not required because purpose of notice satisfied); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (1976) (dismissal and refiling not required); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974) (not jurisdictional); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975) (jurisdictional), *cert. denied*, 424 U.S. 927 (1976).

did, this Court has the constitutional authority to look beyond the text of the statute when the literal reading would compel an odd, absurd, or unreasonable result plainly at variance with the purpose of the statute as a whole. The legislative history says that once the government has had time to decide whether to bring an enforcement action in court of its own, a citizen's suit is proper. This is exactly what happened here. To remand a case back for dismissal and refiling would be compelling the Hallstroms to jump through hoops for no purpose. An interpretation, similar to that given to prelitigation requirements in *Zipes* and *Oscar Mayer*, that the notice requirement is subject to cure, waiver, estoppel, or equitable modification is consistent with the text of the notice provision and the purpose of the statute as a whole.

Accordingly, the Hallstroms respectfully request this Court to reverse the decision of the Ninth Circuit and remand the case to the circuit court for consideration of the other issues raised on appeal.

Respectfully submitted,

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July 21, 1989

No. 88-42

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OLAF E. HALLSTROM and MARY E. HALLSTROM,
Petitioners,

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF SIERRA CLUB, DEFENDERS OF WILDLIFE, INC., NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, INC., AND THE WILDERNESS SOCIETY IN SUPPORT OF THE PETITIONERS

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* Counsel of Record

QUESTION PRESENTED

The Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1989) ("RCRA"), provides for citizen enforcement through "citizen suits." RCRA requires that the commencement of each citizen suit be preceded by sixty days' notice from the citizen plaintiff to the Administrator of the United States Environmental Protection Agency, the State in which the alleged violation occurred and the alleged violator.[1]

The question presented is whether the sixty-day notice requirement is jurisdictional (requiring dismissal of the citizen suit and subsequent refiling sixty days after notice) or procedural (requiring a stay instead of a dismissal).[2]

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1. The particular statute in issue, 42 U.S.C.A. § 6972 (West 1983 & Supp. 1989), is reprinted in full for the Court's information in Appendix B.

2. *Amici* note that this is how the Petitioners have framed the question presented in their *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*. Although under a procedural rule a stay usually will be sufficient to cure the deficient notice, in certain circumstances it may instead be appropriate for the court to dismiss the action. *See infra* at 19 n. 11.

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No. 88-42

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OLAF E. HALLSTROM AND MARY E. HALLSTROM,
Petitioners,

v.

TILLIMOOK COUNTY, A MUNICIPAL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF SIERRA CLUB, DEFENDERS OF WILDLIFE, INC., NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, INC., AND THE WILDERNESS SOCIETY IN SUPPORT OF THE PETITIONERS

All parties have consented in writing to the filing of this brief on behalf of *amici curiae* Sierra Club, Defenders of Wildlife, Inc., National Audubon Society, Natural Resources Defense Council, Inc., and The Wilderness Society in support of the Petitioners.[1]

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are nonprofit public interest organizations with large nationwide memberships[2] whose broad purposes include both the enjoyment, study and exploration of this country's vast national resources and the enlistment of public interest in and support for the protection, conservation and preservation of these resources.

1. Petitioners' consent and Respondent's consent are being filed concurrently with the Clerk of the Court in accordance with Rule 36.2 of the Rules of the Supreme Court of the United States.

2. Appendix A hereto provides additional information regarding the individual *amicus* organizations.

Amici participate extensively in and sponsor numerous recreational activities, educational programs and scientific and other research projects to promote a better appreciation and understanding of our natural resources and attendant environmental concerns.

Amici have been actively involved at the federal, state and local level in the comment process on new environmental legislation and amendments to existing legislation and have also instituted or participated in numerous administrative and judicial proceedings to ensure the effective implementation and enforcement of this country's environmental laws, including the Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1989) ("RCRA"), the statute at issue in this case. As an important part of their efforts to promote compliance with federal environmental laws, *amici* have on numerous occasions used the citizen suit provisions in RCRA and other environmental statutes to enjoin public or private activities which violate statutory standards or to compel government agencies to perform statutorily mandated duties. Accordingly, *amici* have a direct interest in the Court's holding in this case, particularly as to how it will impact future citizen suits.

SUMMARY OF ARGUMENT

Prior to 1970, there was a paucity of federal statutes and regulations to protect and conserve this country's environment and natural resources. Because of deep and widespread public concern for the impact of rapid growth on the environment, beginning with the National Environmental Policy Act of 1969 and the Clean Air Act Amendments of 1970, Congress passed and Presidents Nixon, Ford, Carter and Reagan signed into law a far-reaching and complex set of environmental statutes.

These statutes provided for enforcement of their provisions by federal and state agencies. Commencing with the Clean Air Act Amendments, Congress in addition

sought to augment government enforcement and to enlist the help of citizens by authorizing citizens to bring suit in federal courts to enjoin violative activities and to compel government agencies to perform their statutory duties. Accordingly, citizen suit provisions were included in substantially identical form in at least thirteen major environmental statutes, including the Resources Conservation and Recovery Act ("RCRA"), the statute at issue in this case. Comparable provisions were also included in at least five other statutes affecting such diverse areas as energy, consumer protection and civil defense.

To encourage and enable government agencies to carry out their enforcement responsiblities, Congress included in the citizen suit provisions the sixty-day notice provision at issue in this case. Congress did not intend, and therefore did not provide, that the notice provision should be a jurisdictional barrier to citizen action, nor did it intend or provide that necessary relief should be delayed when government agencies decline or refuse to act or waive notice. Accordingly, Congress enacted a notice provision that is akin to an exhaustion of remedies requirement. Although compliance should be required in all appropriate cases, the provision should be held to be waivable and held inapplicable when strict compliance would otherwise be futile or lead to anomalous results, or preclude essential temporary relief.

Indeed, treating the notice provision as an inflexible, formalistic jurisdictional barrier would vitiate Congress' purpose of encouraging citizen enforcement and lead to harsh or absurd results. Without advancing any legitimate purpose, a jurisdictional construction would also disable federal courts from providing essential temporary injunctive relief in cases when notice would otherwise be waived or excused. Finally, a jurisdictional construction would arm polluters with the weapon of a jurisdictional objection

pertaining not to themselves, but to governmental agencies who have waived notice or have no interest in raising the notice issue.

Although the issue as framed is deceptively narrow and simple, i.e., is the RCRA notice provision "procedural" or "jurisdictional," the Court's ruling may well impact each of the statutes providing for citizen enforcement. Parties effected by those statutes are not before the Court. A "jurisdictional" construction would seriously impede citizen enforcement not only of RCRA, but of each of those statutes. Under the Endangered Species Act, for example, such a jurisdictional interpretation could lead to the extinction or widespread destruction of a species while citizens, whom Congress intended to encourage, waited unnecessarily and helplessly for the sixty-day period to elapse.

ARGUMENT

I.

RCRA IS ONE OF A COMPREHENSIVE SET OF REGULATORY STATUTES INTENDED TO PROTECT THE ENVIRONMENT, AND THIS COURT SHOULD THEREFORE BE AWARE OF THE POTENTIAL IMPACT ITS DECISION IN THIS CASE WILL HAVE ON MANY ENVIRONMENTAL STATUTES

In 1976, Congress passed and President Ford signed into law the Resource Conservation and Recovery Act (codified at 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1989)) ("RCRA") to regulate the disposal of hazardous wastes and minimize the harms to health and environment caused by unsafe disposal.[3]

3. "The Resource Conservation and Recovery Act of 1976 is a multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year and the problems resulting from the anticipated 8% annual increase in the volume of such waste." H. Rep. No. 1491, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238, 6239. *See generally* Note, *EPA's Responsibilities Under RCRA: Administrative Law Issues*, 9 Ecology L.Q. 555, 555 (1981).

RCRA is one of a comprehensive set of federal regulatory statutes enacted during the 1970s in response to widespread public concern over the devastating environmental impact resulting from this country's rapid growth. Commencing with the National Environmental Policy Act of 1969 (codified at 42 U.S.C.A. §§ 4321-4370 (West 1977 & Supp. 1989)) ("NEPA") and the Clean Air Act Amendments of 1970 (codified at 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1989)) ("Clean Air Act Amendments"), Congress enacted numerous environmental statutes, including the Federal Water Pollution Control Act (codified at 33 U.S.C.A. §§ 1251-1375 (West 1986 & Supp. 1989)) ("Clean Water Act"), the Endangered Species Act (codified at 16 U.S.C.A. §§ 1531-1543 (West 1985 & Supp. 1989)) and the Comprehensive Environmental Response, Compensation, and Liability Act (codified at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1989)) ("CERCLA"), which, together with other statutes, provide a regulatory framework for protecting and conserving the environment.[4] Because RCRA is but one component of a

4. Other statutes include the Safe Drinking Water Act (codified at 42 U.S.C.A. §§ 300f-300j-10 (West 1982 & Supp. 1989)); the Toxic Substance Control Act (codified at 15 U.S.C.A. §§ 2601-2671 (West 1982 & Supp. 1989)); the Marine Protection, Research, and Sanctuaries Act (codified at 33 U.S.C.A. §§ 1401-1445 (West 1986 & Supp. 1989)); the Surface Mining Control and Reclamation Act (codified at 33 U.S.C.A. §§ 1201-1328 (West 1986 & Supp. 1989)); the Noise Control Act (codified at 42 U.S.C.A. §§ 4901-4918 (West 1983 & Supp. 1989)); the Act to Prevent Pollution From Ships (codified at 33 U.S.C.A. §§ 1901-1912 (West 1986 & Supp. 1989)); the Outer Continental Shelf Lands Acts (codified at 43 U.S.C.A. §§ 1331-1356 (West 1986 & Supp. 1989)); and the Deepwater Port Act (codified at 33 U.S.C.A. §§ 1501-1524 (West 1986 & Supp. 1989)). The purpose provisions of these statutes are set forth alphabetically for the Court's information in Appendix B.

complex set of statutes, the Court should be aware of the potential impact its decision will have on these statutes.

II.

THE LEGISLATIVE HISTORY PERTAINING TO CITIZEN SUIT PROVISIONS AND NOTICE REQUIREMENTS DEMONSTRATE THAT CONGRESS' PRIMARY CONCERN IN ENACTING THESE PROVISIONS WAS TO ENCOURAGE CITIZEN PARTICIPATION IN THE ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

A. Citizen Suit Provisions, Which Were First Codified as Part of the Clean Air Act Amendments, Were Enacted to Encourage Citizen Participation in the Enforcement of Environmental Legislation as a Supplement to Agency Enforcement.

There was a notable absence of federal environmental regulation prior to the enactment of NEPA in 1969 and the Clean Air Act Amendments in 1970. To the extent federal environmental regulations existed, often the only available means for private citizens to participate in the enforcement of these regulations was to attend public hearings. Accordingly, violations of environmental statutes often continued unabated when the federal or state enforcement agencies chose not to act, or for lack of resources could not act. *See* Note, *Notice by Citizen Plaintiffs in Environmental Litigation*, 79 Mich. L. Rev. 279, 299 (1980). *See generally* Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 Envtl. L. Rep. 10309, 10310 (1983).

With the passage of the Clean Air Act Amendments, Congress afforded private citizens the right to sue to enforce the provisions of an environmental statute. The citizen suit provision in the Clean Air Act Amendments became the model for citizen suit provisions that were included in substantially identical form in nearly every subsequent new environmental statute, in amendments to existing federal environmental statutes and in at least five

nonenvironmental regulatory statutes.[5] Because of the paucity of relevant legislative history of the citizen suit provisions in these other statutes,[6] the starting point to understanding Congress' purposes is the legislative history of the Clean Air Act Amendments.

The citizen suit provision in the Clean Air Act Amendments recognized the need for citizen participation in the enforcement of the Clean Air Act both to help achieve the Act's goals and to augment the limited resources of federal and state agencies:

> Citizens in bringing such actions are performing a public service. The limited resources of many State enforcement agencies, bearing the first line of responsibility under this bill, will be fully extended. This [citizen suit] provision, requiring 30 days notice to State and Federal agencies, in which they may initiate abatement proceedings, will allow many violations to come to their attention which otherwise might escape notice.

116 Cong. Rec. S33,103 (daily ed. Sept. 22, 1970) (memorandum submitted by Senator Muskie). *See also* 116 Cong. Rec. S42,387 (daily ed. December 18, 1970) (remarks of Senator Muskie) ("The Senate committee felt it would be impossible to do the total job of air pollution cleanup relying wholly upon the Federal bureaucracy.").

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5. *See* discussion *infra* at 25-26 and Appendix B.

6. *See, e.g., Maine Audubon Society v. Purslow*, 672 F. Supp. 528, 529 n.3 (D. Maine 1987)("In enacting the citizen suit of the Endangered Species Act, Congress appeared to have adopted the notice requirement of other statutes without discussion" *[citing* S. Rep. No. 307, 93rd Cong. 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989, 2999]). *See generally* Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 Envtl. L. Rep. 10309, 10311 (1983) ("There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others.").

While providing for citizen enforcement, Congress anticipated that governmental agencies, federal and state, would be primarily responsible for enforcement.[7] Private citizens were encouraged to uncover violations that otherwise might escape notice, and motivate the agencies to take action. See S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (report of Public Works Committee) ("Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings. . . ."). However, when the government agencies failed to act, citizens should be "unconstrained" to bring enforcement actions, and the federal courts "should not be hesitant to consider them." *Id.*

Thus, by encouraging private citizens to support governmental enforcement and empowering citizens to initiate enforcement actions themselves, Congress sought to accomplish the Clean Air Act's stated purpose to protect and enhance the quality of this country's air resources. Citizen plaintiffs were therefore not to be viewed as "nuisances or troublemakers, but rather as welcome participants in the vindication of environmental rights." *Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977). *See Natural Resources Defense Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) ("[T]he citizen suit provisions reflected a deliberate choice by Congress to widen citizen access to the courts as a supplemental and effective assurance that the [Clean Air] Act would be implemented and enforced").

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7. Indeed, the citizen suit provision in the Clean Air Act Amendments contains a statutory bar to the filing of a citizen suit where "the Administrator or State has commenced and is diligently prosecuting" its own enforcement action. 42 U.S.C.A. § 7604 (West 1983). *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. ___, 108 S. Ct. ___, 98 L. Ed. 2d 306, 318 (1987) (relating to similar provision in Clean Water Act, 33 U.S.C.A. § 1365(b)(1)(B) (West 1986)).

B. The Notice Requirement Was Not Added to Create a Rigid Barrier to Citizen Suits, But Rather to Encourage Agency Enforcement.

Although Congress envisaged private citizens undertaking an essential role in the enforcement of the Clean Air Act, proponents as well as opponents of the amendments to the Act expressed concern that citizen suits could overburden the courts and interfere with government enforcement of alleged violations. *See Air Pollution—1970: Hearings on S. 3229, S. 3466 & S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 1184 (1970). For example, proponents were careful to note that the proposed citizen suit provisions did not provide for the award of damages to private plaintiffs, 42 U.S.C.A. § 7604(a) (West 1983), and empowered the courts to award attorneys' fees and costs to the prevailing party, thereby deterring frivolous lawsuits, 42 U.S.C.A. § 7604(d) (West 1983).

> First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under the bill.

116 Cong. Rec. S33,104 (daily ed. Sept. 22, 1970) (remarks of Senator Hart).

The Senate subcommittee also included a notice requirement. As originally drafted, it required citizen plaintiffs to give thirty days notice to the Environmental Protection Agency ("EPA"), its field representative, the state air pollution control agency and the alleged violator before filing suit. *See* S. 4358, 91st Cong., 2d Sess., 116 Cong. Rec. 32,381 (1970). Committee members believed

that the notice provision would serve to trigger administrative action to remedy the alleged violation, thereby eliminating the need for the private citizen to seek relief in the courts.

> [B]efore any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind. *In other words, the idea is to use citizens to trigger the enforcement mechanism*. If that enforcement mechanism does not respond, then the citizen has his right to go to court.

116 Cong. Rec. S33,103 (daily ed. Sept. 22, 1970) (remarks of Senator Muskie) (emphasis added).

In its report on the proposed amendments to the Clean Air Act, however, the Senate Committee on Public Works emphasized that the notice requirement, though intended to encourage intervention by the appropriate government agencies, was not meant to discourage citizen suits.

> The regulations to be promulgated by the Secretary [of the Interior] should reflect simplicity, clarity, and standardized form. The regulations should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent.

S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970). Thus, the citizen plaintiff was not expected to provide detailed or technical information so long as the federal and state agencies and the alleged violator understood the general scope of the citizen's allegations.

Without comment, a joint House-Senate conference committee responsible for resolving inconsistencies between the House and Senate versions of the bill lengthened the notice requirement to sixty days. Conf. Rep. No. 1783, 91st Cong., 2d Sess. 1, 55 (1970) *reprinted in* 1970

U.S. CODE CONG. & AD. NEWS 5374-5391. This version of the notice provision was enacted into law as part of the Clean Air Act Amendments.

C. Although the Federal Courts Are Divided, Those That Follow the Pragmatic Rather Than the Jurisdictional Approach Best Serve the Underlying Purposes of the Notice Requirement.

Those federal courts that have considered the notice requirement in the Clean Air Act Amendments and other federal environmental statutes have consistently recognized that Congress sought to facilitate and encourage citizen involvement while preserving the primary enforcement role of the federal and state regulatory agencies and shielding the federal courts from an unmanageable number of citizen suits. *See, e.g., Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 84 n.4 (2d Cir. 1975) (purpose of sixty-day notice requirement of Clean Water Act is to give the administrative agencies time to investigate and act on an alleged violation); *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976) (Congress intended to provide for citizen suits in a manner least likely to clog the courts and most likely to trigger agency enforcement). These courts, however, have divided on how to interpret the notice requirement to best serve these congressional purposes.

The federal circuit courts have generally split into two groups, adopting either a "pragmatic approach" toward the notice requirement—in essence treating the notice requirement in environmental statutes as procedural—or a "jurisdictional approach," which requires dismissal for lack of subject matter jurisdiction if the citizen plaintiff has not strictly complied with the sixty-day notice requirement. The "pragmatic approach" has been adopted by the Second, Third and Eighth Circuits, see, *e.g., Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir. 1976) *cert. denied*, 434 U.S. 902 (1977); *Proffitt v. Comm'rs, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985); *Hempstead*

County and Nevada County Project v. United States Environmental Protection Agency, 700 F.2d 459, 463 (8th Cir. 1983), while the "jurisdictional approach" has been adopted by the First, Sixth, Seventh and Ninth Circuits, *see, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 78 (1st Cir. 1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975); *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-601 (9th Cir. 1988).[8]

The courts adopting the pragmatic approach reason that a rigid, literal reading of the notice requirement would hinder rather than encourage the filing of citizen suits, thus frustrating Congress' intent in adopting the citizen suit provisions that "any citizen [should be able] to bring action directly against polluters . . . or against the Administrator grounded on his failure to discharge his duty to enforce the statute against polluters." *Natural Resources Defense Council v. Train*, 510 F.2d at 700. *See Friends of the Earth v. Carey*, 535 F.2d at 172; *Proffitt v. Commr's*, 754 F.2d at 506. A pragmatic rather than a jurisdictional reading of the notice requirement ensures that the regulatory agencies have been given sufficient opportunity to act on the alleged violation but does not discourage citizen plaintiffs from participating in the enforcement process. *See Proffitt*, 754 F.2d at 506 (sixty-day notice requirements of Clean Water

8. While some courts have cited *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974) in support of the pragmatic approach, the D.C. Circuit in that case found jurisdiction on other grounds, namely under the "savings" clause, Section 505(e), of the Clean Water Act. In dictum, however, the court indicated that it would adopt the pragmatic approach if it were required to interpret the notice requirement of the Clean Water Act. *See id.* at 703 ("Sound discretion bids a court stay its hand upon petition by the Administrator where it has reason to believe that further agency consideration may resolve the dispute. . . . However, the court has jurisdiction and may maintain the action on its docket in a suspense status, and even grant temporary relief.").

Act and RCRA "should be applied flexibly to avoid hindrance of citizen suits through excessive formalism"); *Susquahanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3d Cir. 1980) ("We agree . . . that reading [the notice requirement of the Clean Water Act] to require dismissal and refiling of premature suits would be excessively formalistic.").

The pragmatic approach also avoids the waste of judicial resources which results under the jurisdictional approach, which would require the dismissal and refiling of an action after months, or in some cases years, of legal proceedings due solely to a failure to meet the formal notice requirements, even when the defendants are not prejudiced by the failure to give such notice. As the Third Circuit Court of Appeal noted in *Pymatuning Water Shed Citizens v. Eaton*, 644 F.2d 995, 996 (3d Cir. 1981),

> Requiring [the dismissal and refiling of actions] after proceeding to the stage of the case presently before us would . . . waste judicial resources. Moreover, the appellant's argument, if adopted, would frustrate citizen enforcement of the [Clean Water] Act. Almost two years have now passed since the filing of the complaint in this action and in the meantime, the alleged flow of sewage has continued unabated.

See State of California v. Dept. of Navy, 431 F.Supp. 1271, 1278-79 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980) ("[N]o purpose would be served by dismissing here since plaintiffs could and would *immediately* refile this lawsuit. [Footnote omitted]. Dismissal now would be, in effect, the ultimate disservice to judicial economy.").[9]

9. It also should be noted that if failure to give strictly complying sixty-day notice creates a jurisdictional barrier, defendants will be encouraged, even as statutory violations continue unabated, to raise the jurisdictional sword for the first time on appeal or to seek to reopen adverse final judgments. The resultant need to refile the action and relitigate the merits in order to enforce statutory standards would be a disservice to judicial economy.

Those courts adopting the jurisdictional approach have interpreted the language of the notice provision as a jurisdictional barrier. They reason that where Congress has "clearly" set forth the requirements for notice, the courts need not, and should not, engage in any speculative interpretation of the notice provision. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Garcia*, 761 F.2d at 79. *See also Hallstrom*, 844 F. 2d at 600 (citing *Garcia*); *Walls*, 761 F.2d at 316. They view the express exceptions to the sixty-day notice requirement under certain circumstances (e.g., the exception in RCRA for hazardous waste, 42 U.S.C.A. § 6972(b)(1)(A), and (2)(A) (West Supp. 1989)), as further evidence that Congress intended the notice requirement to be a rigid jurisdictional barrier to citizen suits. *See, e.g.*, *Hallstrom*, 844 F.2d at 601; *Walls*, 761 F.2d at 316. To ignore the sixty-day notice requirements would in their view "'constitute[sic], in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia*, 761 F.2d at 78, *quoting City of Highland Park v. Train*, 374 F. Supp. 758, 766 (N.D. Ill. 1974), *aff'd* 519 F.2d 681 (7th Cir. 1975), *cert. denied* 424 U.S. 927 (1976).

These courts reason further that the notice requirement was adopted primarily to encourage regulatory agencies to step in and obtain a nonjudicial resolution of the alleged violation, and that this goal would be thwarted if citizens were allowed to file suit prior to the completion of the sixty-day notice period. *See Hallstrom*, 844 F.2d at 601; *Garcia*, 761 F.2d at 82. Simply staying the proceeding for sixty days to provide the parties with an opportunity to resolve the dispute would in their view not satisfy the statute, for "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely." *Hallstrom*, 844 F.2d at 601. Thus, these courts have concluded that nothing short of dismissal and the giving of

full sixty-day notice will suffice to encourage the nonjudicial resolution of the environmental conflict at issue.

For the reasons that follow, the pragmatic approach best serves the statutory purpose.

III.

THE COURT SHOULD APPLY A PRAGMATIC APPROACH TO THE SIXTY-DAY NOTICE REQUIREMENT TO ACCOMPLISH RCRA'S GOALS AND AVOID ANOMALOUS RESULTS

A. The Statute does not Preclude Federal Jurisdiction and to Interpret it to do so would Defeat its Purpose.

As noted above, *supra* at 14, courts adopting a formalistic jurisdictional reading of the sixty-day notice requirements in environmental statutes have concluded that the "explicit, unconditional" language requiring citizen plaintiffs to give sixty-day notice prior to commencing an action imposes an obligation on the courts to apply the notice requirement literally and dismiss any citizen suits where notice is defective.

This Court has repeatedly held, however, that federal statutes should be interpreted to comport with and promote the purposes of the entire statute. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute. . ."); *Trans Alaska Rate Cases*, 436 U.S. 631, 643 (1978). Where a literal reading of a statute would lead to "absurd or futile results" or results which are "'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose underlying the statute rather than its literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940), *quoting Ozawa v. United States*, 260 U.S. 178, 194 (1922).

As the cases discussed below demonstrate, a formalistic jurisdictional reading of the notice requirement contained in RCRA and other environmental statutes would produce harsh and absurd results that would frustrate, rather than further, the underlying congressional purpose to protect and conserve the environment. In such cases, courts should have the discretion to interpret the notice requirement flexibly in a manner that avoids such anomalous results while furthering the congressional purpose.

B. The Pragmatic Approach Avoids the Unfair and Absurd Results that would Arise from a Formalistic Application of the Notice Requirement.

In *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977), plaintiffs filed suit under the Clean Air Act to enjoin an increase in New York City transit fares and to enforce the "clean air" provisions of the Transportation Control Plan for the New York metropolitan area. Id. at 168. Before filing suit, plaintiffs sent proper sixty-day notices to the Governor of New York, the EPA, the State environmental protection agency and to each of fifteen agents and agencies of the State to whom some enforcement authority had been delegated, including the Metropolitan Transit Authority ("MTA"). *Id.* at 174. After filing suit, plaintiffs added the New York City Transit Authority ("TA"), which was responsible for authorizing the fare increase, as an additional defendant. The district court refused to enjoin the fare increase primarily on the basis that the TA received inadequate notice, even though plaintiffs sent proper notice to the MTA, the TA's sister agency, and to both the chairman of the TA and its general counsel in their capacities as MTA rather than TA officials. *Id.* On appeal, the Second Circuit found the district court's "technical, crabbed reading" of the notice requirement to be "completely at odds with the announced purpose of the statute, which looks to substance rather than to form in an effort to facilitate citizen involvement," and reinstated the complaint as to the TA. *Id.* at 175. *See also National*

Wildlife Federation v. Coleman, 400 F.Supp. 705, 709 (S.D. Miss. 1975), *rev'd on other grounds*, 529 F.2d 359, *reh'g denied*, 532 F.2d 1375, *cert. denied*, 429 U.S. 979 (1976) (notice requirement of the Endangered Species Act satisfied even though plaintiff's letter to appropriate government agencies did not expressly state intention to file suit); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 373 F.Supp. 1089 (D. D.C. 1974), *rev'd on other grounds*, 511 F.2d 809 (D.C. Cir. 1975) (notice requirement of Clean Air Act met even though notice sent by regular mail rather than by certified mail as required by applicable regulations).

In *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975), plaintiffs filed suit under NEPA and the Clean Water Act to enjoin further dumping by the United States Navy of highly polluted dredged spoil at a designated dumping site in Long Island Sound. The district court held that it lacked jurisdiction to determine the merits of the Clean Water Act claim because the sixty-day notice requirement of the Act had not been met (plaintiffs had filed suit fifty days from the notice date). *Id.* at 83. The court of appeals rejected such a technical reading of the notice requirement and instead sought to determine whether the underlying purpose of the notice requirement, to give the agencies time to act, had been met. Noting that the administrative agencies had sufficient time to investigate plaintiffs' allegations prior to the filing of the complaint and had in fact informed plaintiffs that no administrative action would be taken, the court found that the purpose of the notice requirement had in fact been met.

> [T]he purpose of the 60-day waiting period, which is to give the administrative agencies time to investigate and act on an alleged violation, has been served. The EPA and other agencies were given notice by plaintiffs

> of the alleged violations and plaintiffs were informed before this suit was commenced that no action would be taken.

Id. at 84 n.4.[10] *Cf. Proffitt v. Comm'rs, Township of Bristol*, 754 F.2d 504, 506 (3rd Cir. 1985) (where agencies had received reports of alleged violations three years before citizen suit was filed and plaintiff met with agency officials to discuss alleged violations five months prior to filing suit, defendants received notice-in-fact sufficient to satisfy Clean Water Act and RCRA notice requirements); *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 644 F.2d 995 (3d Cir. 1981) (sixty-day notice requirement of Clean Water Act met where district court stayed proceeding for sixty days, and eleven months elapsed before court began hearing evidence in the case).

In *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976), plaintiffs sought to enjoin construction of several proposed dams in the state of Missouri, claiming that the original environmental impact study was inadequate in its attempt to assess the effect of the dams on the region and on a species of bat native to that region. Defendants moved to dismiss the Endangered Species Act claim for lack of subject matter jurisdiction, alleging that plaintiffs had failed to give the requisite sixty-day notice. Although the district court did not dispute that sixty-day notice had not been given, it nonetheless denied defendants' motion, finding that, because of the unique nature of the evidence presented at trial, the motion should be denied in the interests of justice.

> [C]onsidering the fact that there are only five or six experts in the study of Myotine Bats in the world and

10. Although the *Callaway* court did not ultimately rely on Section 505(a) of the Clean Water Act Amendments (containing the citizen suit provision), in finding that the trial court had subject matter jurisdiction to determine the merits of plaintiffs' claim, instead relying on the statute's "savings" clause, the court suggested in dictum that it would also have found jurisdiction under Section 505(a). *Id.* at 84 n.4.

> that the habits, biology and other characteristics of the bats were fully developed at the trial, this Court feels that a dismissal of plaintiffs' claim for failure to comply with the time limit stated in the statute would work an injustice to the adjudication of plaintiffs' claim. To allow defendants to further prepare for trial, in the opinion of this Court, would produce no added evidence which would help this Court in its decision.

Id. at 1303, *quoting Sierra Club v. Froehlke*, 392 F.Supp. 130, 143 (E.D. Mo. 1975). The Eighth Circuit affirmed the district court's ruling, agreeing with the district court that the unique evidentiary situation involved in the case required a less formal reading of the notice requirement. *Id.* at 1303.

If there is a common thread running through all these cases, it is a willingness of the courts to respond to the exigencies of the case at hand and fashion a result that best serves the interests of justice while adhering to the underlying congressional purpose in enacting the citizen suit provisions. These courts do not ignore the sixty-day notice requirement, but instead look to the facts involved in the case to determine if the plaintiff has provided sufficient notice to afford the government agencies adequate opportunity to investigate the alleged violation and initiate enforcement action if necessary. In this way, Congress' intention to encourage government enforcement prior to the filing of a citizen suit is satisfied without risking the anomalous results that could arise from a formalistic jurisdictional reading of the notice requirement.[11]

11. Under the pragmatic approach, a stay of the litigation will normally be sufficient to cure the deficient notice. However, in some circumstances it may instead be appropriate for the court, based on considerations such as the direct and adverse impact of continuing the action on the party not receiving notice, to dismiss the action altogether.

C. A Formalistic Jurisdictional Rule Would Needlessly Hamper Courts and Leave the Environment at Risk During the Sixty-Day Notice Period.

The flexibility afforded by the procedural approach to the notice requirement is particularly important during the sixty-day period following notice. Frequently, citizens do not uncover a statutory violation until the situation is critical. Although citizens can then notify the appropriate authorities immediately, the governmental response may be both insufficient and untimely. Under a jurisdictional approach, citizen plaintiffs in these situations would be compelled to await the expiration of the sixty-day notice period even if the government agencies explicitly declined to act.[12] Thus, the courts would be prevented from providing interim temporary relief to preserve the status quo during the sixty-day period. In the meantime, irreparable (and preventable) injury to the environment may result. This is a concern that a rigid jurisdictional rule does not adequately address.

D. The Notice Provision Speaks of Commencement of an Action, Not Judicial Jurisdiction, and Therefore is Subject to Pragmatic Construction Akin to the Principles Governing Exhaustion of Remedies.

12. In 1984, RCRA was amended to provide for an exception to the sixty-day notice requirement if the citizen suit is filed respecting a violation of RCRA Subchapter III (relating to the discharge of hazardous wastes). 42 U.S.C.A. § 6972(b)(1)(A) (West Supp. 1989). Although the 1984 amendment anticipates some emergency situations where citizens should be able to go to court without giving any notice whatsoever to halt a noncomplying activity, it is unlikely that Congress intended by inference that Subchapter III violations include the full range of harmful activities to which a court should respond immediately, unhindered by a jurisdictional requirement that the sixty days first run. Actions against government agencies to compel performance of mandatory duties and actions to enjoin violative activities are two very different actions, the former only indirectly (and belatedly) addressing the concerns of the latter. It is this latter type of action, actions to enjoin violative activities during the sixty-day period, which a formalistic jurisdictional rule would preclude, regardless of the nature of the harm threatened.

1. Congress Could Have Expressly Stated the Notice Provision as a Predicate to Jurisdiction But Did Not.

The enabling provision of RCRA's citizen suit statute, 42 U.S.C.A. § 6972(a) (West Supp. 1989), expressly provides that the "district court shall have *jurisdiction*, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition or order." (emphasis added). Such express jurisdictional language is in sharp contrast to RCRA's sixty-day notice requirement, 42 U.S.C.A. § 6972(b) (West Supp. 1989). This latter provision does not begin with the words "The court shall not have jurisdiction unless . . ." or words of similar import. Instead, the provision begins "No action may be commenced . . . ." In fact, nowhere in the notice provision or elsewhere in the statute is federal court subject matter jurisdiction expressly precluded if an action is commenced prior to the expiration of the sixty-day notice period. This omission is for good reason: the notice provision is far more akin to an exhaustion of remedies requirement, subject to pragmatic construction and waiver, than a jurisdiction requirement. *See National Resources Defense Council v. Train*, 510 F.2d 692, 703 (D.C. Cir. 1975) ("the courts may properly give effect to the salutary purpose underlying the notice provision [of the Clean Water Act] by resorting to familiar doctrines such as those underpinning the requirement of exhaustion of administrative remedies.").

2. The Sixty-Day Notice Provision is Analogous to a Requirement that a Party First Exhaust All Administrative Remedies Before Commencing an Action; This Court has Consistently Held Such Requirements to be Procedural.

RCRA's requirement that sixty days notice be given before commencing a citizen suit is analogous to statutory requirements that a plaintiff exhaust all available administrative remedies before commencing the action. In each

case, Congress has required the would-be plaintiff to first complete a specified act, designed to relieve the burden on the court system, before he may commence the action. This Court has consistently held exhaustion statutes to be procedural and applied flexibly in accordance with the court's sound equitable discretion. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 76566 (1975). *See also Kennedy v. Whitehurst*, 690 F.2d 951, 961 (D.C. Cir. 1982) ("exhaustion requirements are *not* jurisdictional in nature but rather are statutory conditions precedent to the instigation of litigation") (emphasis included). Thus, they can be waived or held inapplicable in cases of emergency or when application would otherwise be futile or absurd. *See Coit Independent Joint Venture v. FSLIC*, No. 87-996, slip op. at 23 (Sup. Ct. March 21, 1989) ("Administrative remedies that are inadequate need not be exhausted."); *Honig v. Doe*, 484 U.S. 305 (1988) ("It is true that judicial review is normally not available under [20 U.S.C.A.] § 1415(e)(2) [of the Education of the Handicapped Act] until all administrative proceedings are completed, but as we have previously noted, parties may by-pass the administrative process where exhaustion would be futile or inadequate"); *Salfi*, 422 U.S. at 765-66 ("further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest"); *McNeese v. Board of Education*, 373 U.S. 668, 674-76 (1963) (the requirement that administrative remedies be exhausted does not include the performance of clearly useless acts). *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982) (timely filing of charge of discrimination with EEOC not a jurisdictional prerequisite to suit in federal court, but instead is subject to waiver, estoppel, and equitable tolling).

The reasoning this Court has applied to its construction of the exhaustion of administrative remedies statutes applies to the sixty-day notice provision at issue in this

case. The kindred principles of exhaustion of remedies and prior notice should therefore be construed harmoniously.

E. Given Congress' Demonstrated Ability to Limit Federal Court Jurisdiction in Explicit Terms, its Nonjurisdictional Language in the Notice Provisions Should Not Be Converted into a Jurisdictional Barrier.

In the past, Congress has demonstrated that when it intends to limit federal court jurisdiction, it will do so in express terms, such as "Except as provided in this section, no court of the United States shall have jurisdiction . . . ," a limitation that this Court has consistently upheld. *See Lockerty v. Phillips*, 319 U.S. 182, 18687 (1943) (upholding grant to Emergency Court of exclusive equity jurisdiction to restrain enforcement of price orders under Emergency Price Control Act of 1942); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (upholding the limitations in the Norris-La Guardia Act, 29 U.S.C.A. § 107 (West 1983), that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, [except in strict conformity with the provisions of this chapter]."); *South Carolina v. Katzenbach*, 383 U.S. 301, 331-32 (1966) (upholding limit in the Voting Rights Act of 1965 to litigation in a single court in the District of Columbia).

Congress has also demonstrated its ability to limit the jurisdiction of federal courts by enacting express limitations in the very statutes that concern the jurisdiction and power of the federal courts, such as in the Tax Injunction Act, 28 U.S.C.A. § 1341 (West 1976) ("The district court shall not . . . ."); the Johnson Act, 28 U.S.C.A. § 1342 (West 1976) ("the district court shall not . . . ."); and the Anti-Injunction Act, 28 U.S.C.A. § 2283 (West 1978) ("a court of the United States may not . . . ."). *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 407, 411 (1982) (Tax Injunction Act); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 294-95 (1970) (Anti-Injunction Act).

By contrast, RCRA's notice provision contains no jurisdictional language. It does not seek in jurisdictional terms to limit the power of the federal courts. In the absence of express language, this Court should not construe the notice provision to impose a jurisdictional barrier, particularly when to do so would advance no statutory purpose and create the possibility of absurd results. *See Avery v. Secretary of Health and Human Service*, 762 F.2d 158, 163 (1st Cir. 1985) ("[A]bsent a clear statement to the contrary, legislation should not ordinarily be interpreted to oust a federal court's equitable power, or its jurisdiction over a pending case." [*Citing Califano v. Yamasaki*, 442 U.S. 682, 705-06 (1979)]).

F. The Sixty-Day Notice Provision Should Not Be Construed to Allow Polluter Defendants Standing to Raise Technical Objections Applicable Not to Themselves But to Third Parties.

"[A] litigant must normally assert his own legal interests rather than those of third parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties."). This rule prevents unnecessary and premature decisions and assures the court that the issues before it will be concrete and sharply presented. *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 955 (1984). This limitation can be relaxed, for example, "[w]here practical obstacles prevent a party from asserting rights on behalf of itself . . . ." *Id.* at 956.

By contrast, in this case the Respondent County of Tillamook, found by the district court below to be operating a landfill in violation of RCRA, is asserting the inadequacy of the notice not to itself but rather to the Administrator of the EPA and the Oregon Department of Environmental Quality. The Petitioners delivered complying notice to the County twelve months prior to the

commencement of the action. *Petition For Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit*, at 4. Under the *jus tertii* rules of *Phillips* and *Munson*, the County has no standing to assert such an objection unless the objection is so fundamental as to be jurisdictional, which is not this case.

Indeed, it is inconceivable that Congress intended to allow polluter defendants to raise objections applicable not to themselves but to federal and state enforcement agencies. Upholding the County's objection in this case thus would contradict well-established standing limitations and advance no statutory purpose.[13]

IV.

AN INFLEXIBLE JURISDICTIONAL RULE WILL LEAD TO THE DISRUPTION OF CONGRESS' PURPOSE OF FOSTERING CITIZEN ENFORCEMENT UNDER AT LEAST EIGHTEEN OTHER MAJOR STATUTES

Unless the Court expressly limits its holding in this case to RCRA, its ruling is likely to be applied under at least eighteen other major regulatory statutes, including substantially all significant environmental statutes enacted since 1970,[14] as well as statutes regulating such diverse areas as energy (the Energy Policy and Conservation Act,

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13. Significantly, Congress included in the citizen suit section of RCRA and other environmental statutes a provision allowing private citizens to "intervene as a matter of right" in any enforcement action commenced by the government without any requirement of prior notice to the violator. *See, e.g.*, 42 U.S.C.A. § 6972(b)(2) (West Supp. 1989). It seems fundamentally inconsistent for the County to raise the failure of the Petitioner to give notice to the Administrator of the EPA and to the Oregon Department of Environmental Quality as a barrier to jurisdiction when if either had actually commenced enforcement proceedings against the County, the Petitioners could have intervened without giving any notice whatsoever to the County.

14. See discussion *supra* at 5.

the Natural Gas Pipeline Safety Act and the Ocean Thermal Energy Conservation Act), consumer safety (the Consumer Product Safety Act) and civil defense (the Emergency Planning and Community Right-to-Know Act).[15] *Amici* urge this Court to construe RCRA's sixty-day notice requirement as a procedural requirement and avoid a formalistic jurisdictional rule that could jeopardize effective enforcement of these statutes.[16]

Amici respectfully request further that this Court be cognizant of the potential impact its ruling likely will have on the future viability of citizen suits to prevent environmental harms.

A. The Endangered Species Act Affords a Striking Example of the Absurd and Harsh Results of a Formalistic Jurisdictional Rule.

Of all the notice provisions of the environmental statutes that could be affected by a ruling in this case, the Endangered Species Act presents perhaps the most compelling argument against a jurisdictional reading of the citizen suit notice provision. A formalistic jurisdictional rule would not only defeat Congress' express findings and declarations of purposes and policy, it could allow an endangered species to become extinct during the time that the federal courts were deprived of subject matter jurisdiction.

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15. The citations to, and relevant portions of the citizen suit and notice provisions of, these statutes are reprinted alphabetically for the Court's information in Appendix B.

16. In the absence of any jurisdictional language, any need to advance a jurisdiction-limiting objective, or any evidence that the federal courts are burdened by litigation commenced without notice, the burden of persuading Congress to erect a jurisdictional barriers under these statutes should be on the government and the Respondent. Private citizens, whose aid Congress sought to enlist to protect the environment, should not be burdened with the task of persuading Congress to remove a jurisdictional barrier that the statutory language and purpose do not require and that will frustrate Congress' effort to obtain effective enforcement.

1. The Statutory Framework of the Endangered Species Act.

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978), this Court observed that the "Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Congress required that "all Federal departments and agencies shall seek to conserve endangered and threatened species. . . ." 16 U.S.C.A. § 1531(c) (West 1985).[17]

In order to accomplish the stated objectives of the Endangered Species Act, Congress set forth various procedures for the listing of threatened and endangered species, the designation of critical habitat, and the development of recovery plans. 16 U.S.C.A. § 1533 (West 1985 & Supp. 1989). Once a species is listed by the Secretary of the Interior or the Secretary of Commerce, the species is expressly protected by the provisions of the Act or regulations promulgated thereunder. Section 9, 16 U.S.C.A. § 1538 (West 1985 & Supp. 1989), contains a list of acts prohibited by Congress in order to preserve and protect endangered species. Section 9 makes it unlawful for any person to "take" an endangered species of fish or wildlife.[18] The prohibitions against taking apply to "any person subject to the jurisdiction of the United States," 16 U.S.C.A. § 1538(a)(1) (West 1985), which includes virtually

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17. Congress defined "conserve" for the purposes of the Endangered Species Act to mean the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures. . . . [of the Endangered Species Act] are no longer necessary." 16 U.S.C.A. § 1532(3) (West 1985).

18. Congress defined "take" broadly, 16 U.S.C.A. § 1532(19) (West 1985), to include "harm," which the Secretary of the Interior has defined as "an act which actually kills or injures wildlife . . . [including] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

any private individual or association, state or local governmental agency and any federal government officer, department or agency. 16 U.S.C.A. § 1532(13) (West 1985).

Congress also required that each federal agency ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any federally listed species or adversely affect critical habitat for any listed species. 16 U.S.C.A. § 1536(a)(2) (West 1985). It established a consultation process that requires a federal agency whose proposed action potentially jeopardizes a federally listed species to consult with the Secretary of the Interior or the Secretary of Commerce concerning the effect of that action. 16 U.S.C.A. §§ 1536(a), 1536(b) (West 1985). Given the consultation process, the United States Fish and Wildlife Service plays a key enforcement role. It frequently renders a biological opinion concerning the impacts of a proposed project on a federally listed species. Because of the close working relationship between the United States Fish and Wildlife Service and other federal land management agencies such as the United States Forest Service and the Bureau of Land Management, the Secretary of the Interior rarely sues a sister agency to enforce the statute. Accordingly, when a federal agency is the potential defendant, the burden of enforcement falls primarily on concerned and willing citizens and their organizations.

2. The Citizen Suit Provision of the Endangered Species Act.

Three types of citizen suits may be brought to enforce the Endangered Species Act: (a) actions to enjoin any person, including the United States, who is alleged to be in violation of the Act or its implementing regulations, 16 U.S.C.A. § 1540(g)(1)(A) (West 1985), (b) actions to compel the Secretary of the Interior or the Secretary of Commerce to apply the prohibitions of the Act during the transition period immediately following the passage of the Act, 16 U.S.C.A. § 1540(g)(1)(B) (West 1985), and (c) actions to

compel the Secretary of the Interior or the Secretary of Commerce to perform a non-discretionary duty listed in section 4 of the Act (relating to the listing of threatened and endangered species, designation of critical habitat, development of recovery plans, and promulgation of implementing regulations), 16 U.S.C.A. § 1540(g)(1)(C) (West 1985). The overwhelming majority of citizen actions are injunction actions of the first type.[19]

3. Because Congress did not Intend to Permit a Species to Become Extinct During the Notice Period, a Pragmatic Rather Than a Jurisdictional Rule is Essential Under the Endangered Species Act.

A pragmatic approach to the Endangered Species Act citizen suit notice provision is essential. When injury to federally listed species could result in irreparable damage and perhaps extinction during the sixty-day period, federal courts should not be deprived of subject matter jurisdiction as a result of a inflexible, formalistic interpretation of the sixty-day notice provision. Congress did not intend to condition survival of a species on compliance with a notice provision.

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19. The vast majority of courts interpreting the notice requirement of the Endangered Species have held that failure to strictly comply does not raise a jurisdictional barrier. *See, e.g., Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (8th Cir. 1976); *Sierra Club v. Block*, 614 F.Supp. 488, 492 (D. D.C. 1985) (Fish and Wildlife Service and Forest Service response to sixty-day notice letters sufficient to waive the requirement); *Village of Kaktovik v. Corps of Engineers*, 12 Env't Rep. Cas. (BNA) 1740, 1744 (D. Alaska, Dec. 29, 1978) (compliance with "the spirit of the notice requirements" when a suit was filed forty-two days after notice); *National Wildlife Federation v. Coleman*, 400 F.Supp. 705, 710 (S.D. Miss. 1975), *rev'd on other grounds*, 529 F.2d 359, *reh'g denied*, 532 F.2d 1375, *cert. denied*, 429 U.S. 979 (1976). *Contra Save the Yaak Comm.* v. Block, 840 F.2d 714, 721 (9th Cir. 1988); *Maine Audubon Society v. Purslow*, 672 F.Supp. 528, 531 (D. Maine 1987).

Often, when a federal agency is the recipient of an Endangered Species Act notice, the Secretary and the action agency will indicate that they have no intention of modifying their conduct. *See, e.g., Sierra Club v. Block*, 614 F.Supp. 488, 492 (D. D.C. 1985). In these circumstances, a formalistic jurisdictional rule would deprive the district court of jurisdiction until the sixty days elapsed. A species may become extinct while prospective plaintiffs await the termination of a sixty day standstill period and federal agencies proceed apace with their challenged activity.

Finally, a jurisdictional interpretation would prevent the district court from determining whether any deviation from the requisite form of notice is acceptable. For example, in a recent Ninth Circuit opinion, the court held that purported sixty-day notice letters "were not sent to the correct person, the secretary," *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988), despite the fact that the letters were sent to the representatives of the Secretary of the Interior most involved in the contested decision, the Regional Director of the United States Fish and Wildlife Service and the Supervisor of the National Forest. This jurisdictional approach elevates form over substance and vitiates the clear directives of Congress reflected in the Endangered Species Act.

CONCLUSION

Congress encourages and empowers citizens to augment government enforcement of environmental statutes. Its notice requirement should be construed pragmatically and in harmony with this purpose, not as a formalistic jurisdictional barrier. For the reasons set forth in this brief on behalf of *amici curiae*, the judgment of the court of appeals should be reversed with directions to allow the appeal to proceed on the merits.

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APPENDIX A

The respective interests of the *amici curiae* are as follows:

1. Sierra Club is a national conservation organization headquartered in San Francisco, California with more than 500,000 members. Sierra Club was organized in 1892 as a non-profit corporation and its stated purposes include the exploration, enjoyment and preservation of the scenic natural resources of the United States and the enlisting of public interest and cooperation in the protection of these natural resources. In furtherance of these purposes, and of the aesthetic, conservational and recreational interests of its members, Sierra Club has participated extensively in administrative and judicial proceedings intended to protect and preserve these natural resources, and the interests of its members therein, from the injurious acts of others. Specifically, Sierra Club has instituted and participated in numerous citizen suits to compel compliance with or adherence to the statutory requirements of the Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1989) ("RCRA"), and other major environment statutes such as the Endangered Species Act, 16 U.S.C.A. §§ 1531-1543 (West 1985 & Supp. 1989) ("ESA"), the Clean Air Act Amendments of 1970, 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1989) ("Clean Air Act Amendments"), and the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1375 (West 1986 & Supp. 1989) ("Clean Water Act"), including, for example, *Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985); and *Sierra Club v. Hanna Furnace Corp.*, 636 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (9th Cir. 1976). In addition, Sierra Club has actively participated in other major environmental litigation, including, for example, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and *Sierra Club v. Morton*, 405 U.S. 727 (1972).

2. Defenders of Wildlife is a not-for-profit organization of over 65,000 members across the nation and overseas with its principal offices in Washington, D.C. where it was incorporated as Defenders of Furbearers in 1947. Its board is elected by the membership. It is dedicated to preserving wildlife and promoting humane treatment of wild animals, emphasizing appreciation and protection for all species in their ecological role within the natural environment. It pursues this purpose through research, education, litigation and legislation, within the limits of 501(c)(3) of the Internal Revenue Code. One its major program areas is the effort to reduce environmental hazards to wildlife including pesticides, oil and hazardous substances. On April 18, for example, Defenders, along with several other organizations, notified the Exxon Shipping Company of its intent to sue under RCRA in order to require expeditious action to protect wildlife from the spill from the Exxon Valdez. This situation may well require litigation in less than sixty days from the date of the accident in order to fulfill the purposes of that Act.

3. The National Audubon Society (Audubon) is a non-profit, national membership organization dedicated to the protection of the environment and wildlife, and to the conservation of natural resources. Incorporated under the laws of New York State, Audubon maintains its principal place of business at 950 Third Avenue, New York, New York 10022 and has offices in various other cities nationwide. Audubon has more than 550,000 members affiliated with over 500 chapters located throughout the United States and in several foreign countries. Audubon members and staff engage in a broad range of scientific studies, research projects and conservation education programs aimed at improving the understanding and appreciation of wetlands, wildlife habitat, clean air, hazardous waste control, and other environmental concerns. Audubon has actively participated in various legislative, judicial and administrative actions to ensure effective implementation of the laws designed to protect human health and the

environment, including RCRA, ESA, the Clean Air Act Amendments and the Clean Water Act.

4. The Natural Resources Defense Council, Inc. (NRDC) is a non-profit environmental membership organization incorporated under the laws of the State of New York. NRDC's principal office is located at 40 West 20th Street, New York, New York 10011, and also has offices in Washington, D.C. and San Francisco, California. NRDC has over 91,000 members nationwide and is dedicated to the defense and preservation of the human environment and the natural resources of the United States. NRDC's purposes include the monitoring and participating in federal agency decisionmaking to ensure that federal statutes enacted to protect the environment are fully implemented. Since its inception in 1970, NRDC has instituted or participated in numerous citizen suits to enforce compliance with the provisions of RCRA, ESA, The Clean Air Act Amendments, the Clean Water Act and other significant environmental statutes, including, for example, *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975) and *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1975). NRDC has played a leading role in insuring that state and federal governments apply federal laws governing the management of toxic wastes. *See, e.g., Hazardous Waste Treatment Council et al. v. United States Environmental Protection Agency*, Civ. No. 86-1658 (D.C. Cir. Oct. 7, 1988).

5. The Wilderness Society (TWS) is a national non-profit citizens organization with more than 225,000 members nationwide. Headquartered in Washington D.C., TWS is dedicated to the preservation of wilderness and to the proper management of publicly-owned lands. TWS has participated extensively in administrative and judicial actions, including citizen suits, to enforce compliance with the provisions of ESA, the Clean Air Act, the Clean Water Act and other major environmental statutes.

APPENDIX B
STATUTES INVOLVED

I. Act to Prevent Pollution From Ships, 33 U.S.C.A. §§ 1901-1912 (West 1986 & Supp. 1989).

33 U.S.C.A. § 1910 *Legal Actions*

(a) Persons with adversely affected interests as plaintiffs; defendants

Except as provided in subsection (b) of this section, any person having an interest which is, or can be, adversely affected, may bring an action on his own behalf—

(1) against any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder;

(2) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary;

(3) against the Secretary of the Treasury where there is alleged a failure of the Secretary of the Treasury to take action under section 1908(3) of this title.

(b) Commencement conditions

No action may be commenced under subsection (a) of this section—

(1) prior to 60 days after the plaintiff has given notice, in writing and under oath, to the alleged violator, the Secretary concerned, and the Attorney General; or

(2) if the Secretary has commenced enforcement or penalty action with respect to the alleged violation and is conducting such procedures diligently.

. . .

(Pub.L. 96-478, § 11, Oct. 21, 1980, 94 Stat. 2302)

II. Clean Air Act Amendments of 1970, 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1989)

42 U.S.C.§§ 7401 *Congressional Findings and Declaration of Purpose*

(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

(July 4, 1955, c. 360, Title I, § 101, formerly § 1, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 392, and renumbered and amended Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(2), (3), 79 Stat. 992; Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 485)

42 U.S.C.A. § 7604 *Citizen Suits*

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of

this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) Notice

No action may be commenced

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; Intervention by Administrator

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee

thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) Definition

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance programs or vapor recovery requirements, section 7545(3) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise).

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(July 14, 1955, c. 360, Title III, § 304, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1706, and amended Aug. 7, 1977, Pub.L. 95-95, Title III, § 303

(a)-(c), 91 Stat. 771-772; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(77), (78), 91 Stat. 1404)

III. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1989).

42 U.S.C.A. § 9659 *Citizen Suits*

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development and demonstration).

(b) Venue

(1) Actions under subsection (a)(1)

Any action under subsection (a)(1) of this section shall be brought in the district court for the district in which the alleged violation occurred.

(2) Actions under subsection (a)(2)

Any action brought under subsection (a)(2) of this section may be brought in the United States District Court for the District of Columbia.

. . .

(d) Rules applicable to subsection (a)(1) actions

(1) Notice

No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) Diligent prosecution

No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 *et seq.*] to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

(e) Rules applicable to subsection (a)(2) actions

No action may be commenced under paragraph (2) of subsection (a) of this section before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

. . .

(Pub.L. 96-510, Title III, § 310, as added Pub.L. 99-499, Title II, § 206, Oct. 17, 1986, 100 Stat. 1703)

IV. Consumer Product Safety Act, 15 U.S.C.A. §§ 2051-2083 (West 1982 & Supp. 1989).

15 U.S.C.A. § 2073 *Private Enforcement*

Any interested person (including any individual or nonprofit, business, or other entity) may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 of this title, and to obtain appropriate injunctive relief. Not less than thirty days prior to the commencement of such action, such interested person shall give notice by registered mail to the Commission, to the Attorney General, and to the person against whom such action is directed. Such notice shall state the nature of the alleged violation of any such standard or order, the relief to be requested, and the court in which the action will be brought. No separate suit shall be brought under this section if at the time the suit is brought the same alleged violation is the subject of a pending civil or criminal action by the United States under this chapter. In any action under this section the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees.

(Pub.L. 92-573, § 24, Oct. 27, 1972, 86 Stat. 1226; Pub.L. 94-284, § 10(d), May 11, 1976, 90 Stat. 507; Pub.L. 97-35, Title XII, § 1211(a), (h)(3)(C), Aug. 13, 1981, 95 Stat. 721, 723)

V. Deepwater Port Act, 33 U.S.C.A. §§ 1501-1524 (West 1986 & Supp. 1989).

33 U.S.C.A. § 1501 *Congressional Declaration of Policy*

(a) It is declared to be the purposes of the Congress in this chapter to—

(1) authorize and regulate the location, ownership, construction, and operation of deepwater ports in waters beyond the territorial limits of the United States;

(2) provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports;

(3) protect the interests of the United States and those of adjacent coastal States in the location, construction, and operation of deepwater ports; and

(4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law.

(b) The Congress declares that nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.

(Pub.L. 93-627, § 2, Jan. 3, 1975, 88 Stat. 2126)

33 U.S.C.A. § 1515 *Citizen Civil Action*

(a) Equitable relief; case or controversy; district court jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action for equitable relief on his own behalf, whenever such action constitutes a case or controversy—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any provision of this chapter or any condition of a license issued pursuant to this chapter; or

(2) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary. Any action brought against the Secretary under this paragraph shall be brought in the district court for the District of Columbia or the district of the appropriate adjacent coastal State.

In suits brought under this chapter, the district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any provision of this chapter or any condition of a license issued pursuant to this chapter, or to order the Secretary to perform such act or duty, as the case may be.

(b) Notice; Intervention of right by person

No civil action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Secretary and (ii) to any alleged violator; or

(B) if the Secretary or the Attorney General has commenced and is diligently prosecuting a

civil or criminal action with respect to such matters in a court of the United States, but in any such action any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Secretary.

Notice under this subsection shall be given in such a manner as the Secretary shall prescribe by regulation.

. . .

(Pub.L. 93-627, § 16, Jan 3, 1975, 88 Stat. 2140)

VI. Deep Seabed Hard Mineral Resources Act, 30 U.S.C.A. §§ 1401-1473 (West 1986 & Supp. 1989).

30 U.S.C.A. § 1427 *Civil Actions*

(a) Equitable relief

Except as provided in subsection (b) of this section, any person may commence a civil action for equitable relief on that person's behalf in the United States District Court for the District of Columbia—

(1) against any person who is alleged to be in violation of any provision of this chapter or any condition of a license or permit issued under this subchapter; or

(2) against the Administrator when there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary,

if the person bringing the action has a valid legal interest which is or may be adversely affected by such alleged violation or failure to perform. In suits brought under this subsection, the district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the provisions of the chapter, or any term, condition, or restriction of a license or permit issued under this subchapter, or to order the Administrator

to perform such act or duty.

(b) Notice

No civil action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator and to any alleged violator; or

(B) if the Administrator or the Attorney General has commenced and is diligently prosecuting a civil or criminal action with respect to the alleged violation in a court of the United States; except that in any such civil action, any person having a valid legal interest which is or may be adversely affected by the alleged violation may intervene; or

(2) under subsection (a)(2) of this section, prior to 60 days after the plaintiff has given notice of such action to the Administrator.

Notice under this subsection shall be given in such a manner as the Administrator shall prescribe by regulation.

. . .

(Pub.L. 96-283, Title I, §117, June 28, 1980, 94 Stat. 573)

VII. Emergency Planning and Community Right-to-Know Act, 42 U.S.C.A. §§ 11001-11050 (West Supp. 1989).

42 U.S.C.A. § 11046 *Civil Actions*

(a) Authority to bring civil actions

(1) Citizen suits—Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

(B) The Administrator for failure to do any of the following:

(i) Publish inventory forms under section 11022(g) of this title.

(ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition.

(iii) Publish a toxic chemical release form under section 11023(g) of this title.

(iv) Establish a computer database in accordance with section 11023(j) of this title.

(v) Promulgate trade secret regulations under section 11042(c) of this title.

(vi) Render a decision in response to a petition under section 11042(d) of this title within 9 months after receipt of the petition.

. . .

(d) Notice

(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the

Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) of this section or (a)(1)(C) of this section prior to 60 days after the date on which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(Pub.L. 99-499, Title III, § 326, Oct. 17, 1986, 100 Stat. 1755)

VIII. Endangered Species Act, 16 U.S.C.A. §§ 1532-1543 (West 1985 & Supp. 1989).

16 U.S.C.A. § 1531 *Congressional Findings and Declarations of Purposes and Policy*

(a) Findings

That Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(Pub.L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub.L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; as amended Pub.L. 100-478, Title II, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

16 U.S.C.A. § 1540 *Penalties and Enforcement*

. . .

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2) (A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section

1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

. . .

(Pub.L. 93-205, § 11, Dec. 28, 1973, 87 Stat. 897; Pub.L. 94-359, § 4, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, §§ 6-8, Nov. 10, 1978, 92 Stat. 3761, 3762; Pub.L. 97-79, § 9(e), Nov. 16, 1981, 95 Stat. 1079; Pub.L. 97-304, §§ 7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427; Pub.L. 98-327, § 4, June 25, 1984, 98 Stat. 271

as amended Pub.L. 100-478, Title I, § 1007, Oct. 7, 1988, 102 Stat. 2309.)

IX. Energy Policy and Conservation Act, 42 U.S.C.A. §§ 6201-6422 (West 1983 & Supp. 1989).

42 U.S.C.A. § 6201 *Congressional Statement of Purpose*

The purposes of this chapter are—

(1) to grant specific authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

(Pub.L. 94-163, § 2, Dec. 22, 1975, 89 Stat. 874.)

42 U.S.C.A. § 6305 *Citizen Suits*

(a) Civil actions; jurisdiction

Except as otherwise provided in subsection (b) of this section, any person may commence a civil action against—

(1) any manufacturer or private labeler who is alleged to be in violation of any provision of this part or any rule under this part;

(2) any Federal agency which has a responsibility under this part where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary; or

(3) the Secretary in any case in which there is an alleged failure of the Secretary to comply with a nondiscretionary duty to issue a proposed or final rule according to the schedules set forth in section 6293 of this title; and

The United States district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such provision or rule, or order such Federal agency to perform such act or duty, as the case may be. The courts shall advance on the docket, and expedite the disposition of, all causes filed therein pursuant to paragraph (3) of this subsection. If the court finds that the Secretary has failed to comply with a deadline established in section 6295 of this title, the court shall have jurisdiction to order appropriate relief, including relief that will ensure the Secretary's compliance with future deadlines for the same covered product.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the date on which the plaintiff has given notice of the violation (i) to the Secretary, (ii) to the Commission, and (iii) to any alleged violator of such provision or rule; or

(B) if the Commission has commenced and is diligently prosecuting a civil action to require compliance with such provision or rule, but, in any such action, any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the date on which the plaintiff has given notice of such action to the Secretary and Commission.

Notice under this subsection shall be given in such manner as the Commission shall prescribe by rule.

. . .

(Pub.L. 94-163, Title III, § 335, Dec. 22, 1975, 89 Stat. 930; Pub.L. 95-619, Title IV, § 425(f), Title VI, § 691(b)(2), Nov. 9, 1978, 92 Stat. 3266, 3288; Pub.L. 100 12, §§ 8, 11(b), Mar. 17, 1987, 101 Stat. 122, 126)

X. Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1989)

33 U.S.C.A. § 1251 *Congressional Declaration of Goals and Purpose*

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the

protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating

to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, Pub.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

33 U.S.C.A. § 1365 *Citizen Suits*

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

. . .

(June 30, 1948, c. 758, Title V, § 505, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 888; as amended Feb. 4, 1987, Pub.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75)

XI. Marine Protection, Research and Sanctuaries Act, 33 U.S.C.A. §§ 1401-1445 (West 1986 & Supp. 1989).

33 U.S.C.A. § 1401 *Congressional Finding, Policy, and Declaration of Purpose*

(a) Dangers of unregulated dumping

Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) Policy of regulation and prevention or limitation

The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) Regulation of dumping and transportation for dumping purposes

It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

(Pub.L. 92-532, § 2, Oct. 23, 1972, 86 Stat. 1052, Pub.L. 93-254, § 1(1), Mar. 22, 1974, 88 Stat. 50.)

33 U.S.C.A. § 1415 *Penalties*

. . .

(g) Civil Suits by private persons

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a

court of the United States or a State to redress a violation of this subchapter.

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

. . .

(Pub.L. 92-532, Title I, [0015] 105, Oct. 23, 1972, 86 Stat. 1057)

XII. National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370a (West 1977 & Supp. 1989).

42 U.S.C.A. § 4321 *Congressional declaration of purpose*

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and

welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

42 U.S.C.A. § 4331 *Congressional Declaration of National Environmental Policy*

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that is it in the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences:

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.

XIII. Natural Gas Pipeline Safety Act, 49 U.S.C.A. §§ 1671-1687 (West 1976 & Supp. 1989).

49 U.S.C.A. § 1686 *Civil Actions by Citizens*

(a) Mandatory or prohibitive injunctive relief against persons in violation of this chapter

Except as provided in subsection (b) of this section, any person may commence a civil action for mandatory or prohibitive injunctive relief, including interim equitable relief, against any other person (including any State, municipality, or other governmental entity to the extent permitted by the eleventh amendment to the Constitution, and the United States) who is alleged to be in violation of this chapter or of any order or regulation issued under this chapter. The district courts of the United States shall have

jurisdiction over actions brought under this section, without regard to the amount in controversy or the citizenship of the parties.

(b) Restrictions

No civil action may be commenced under subsection (a) of this section with respect to any alleged violation of this chapter or any order or regulation issued under this chapter—

(1) prior to the expiration of 60 days after the plaintiff has given notice of such alleged violation to the Secretary (or to the applicable State agency in the case of a State which has been certified under section 1674(a) of this title and in which the violation is alleged to have occurred), and to any person who is alleged to have committed such violation; or

(2) if the Secretary (or such State agency) has commenced and is diligently pursuing administrative proceedings or the Attorney General of the United States (or the chief law enforcement officer of such State) has commenced and is diligently pursuing judicial proceedings with respect to such alleged violation.

Notice under this subsection shall be given in such manner as the Secretary shall prescribe by regulation.

. . .

(Pub.L. 90-481, § 19, formerly § 17, as added Pub.L. 94-477, § 8, Oct. 11, 1976, 90 Stat. 2075, and renumbered Pub.L. 96-129, Title 1, § 104(b), Nov. 30, 1979, 93 Stat. 992)

XIV. Noise Control Act 42 U.S.C.A. §§ 4901-4918 (West 1983 & Supp. 1989).

42 U.S.C. § 4901 *Congressional Findings and Statement of Policy*

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

(Pub.L. 92-574, § 2, Oct. 27, 1972, 86 Stat. 1234)

42 U.S.C.A. § 4911 *Citizens Suits*

(a) Authority to commence suits

Except as provided in subsection (b) of this section, any person (other than the United States) may commence a civil action on his own behalf—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any noise control requirement (as defined in subsection (e) of this section) or

(2) against—

(A) the Administrator of the Environmental Protection Agency where there is alleged a failure of such Administrator to perform any act or duty under this chapter which is not discretionary with such Administrator, or

(B) the Administrator of the Federal Aviation Administration where there is alleged a failure of such Administrator to perform any act or duty under section 1431 of Title 49 which is not discretionary with such Administrator

The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to restrain such person from violating such noise control requirement or to order such Administrator to perform such act or duty, as the case may be.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the violation (i) to the Administrator of the Environmental Protection Agency (and to the Federal Aviation Administrator in the case of a violation of a noise control requirement under such section 1431 of Title 49) and (ii) to any alleged violator of such requirement, or

(B) if an Administrator has commenced and is diligently prosecuting a civil action to require compliance with the noise control requirement, but in any such action in a court of the United States any person may intervene as a matter of right, or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice to the defendant that he will commence such action.

Notice under this subsection shall be given in such manner

as the Administrator of the Environmental Protection Agency shall prescribe by regulation.

. . .

(Pub.L. 92-574, [0015] 12, Oct. 27, 1972, 86 Stat. 1243)

XV. Ocean Thermal Energy Conservation Act, 42 U.S.C.A. §§ 9101-9168 (West 1983 & Supp. 1989).

42 U.S.C.A. § 9101 *Congressional Declaration of Policy*

(a) It is declared to be the purposes of the Congress in this chapter to—

(1) authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion facilities connected to the United States by pipeline or cable, or located in the territorial sea of the United States consistent with the Convention on the High Seas, and general principles of international law;

(2) authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion plantships documented under the laws of the United States, consistent with the Convention on the High Seas and general principles of international law;

(3) authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion plantships by United States citizens, consistent with the Convention on the High Seas and general principles of international law;

(4) establish a legal regime which will permit and encourage the development of ocean thermal energy conversion as a commercial energy technology;

(5) provide for the protection of the marine and coastal environment, and consideration of the interests of ocean users, to prevent or minimize any adverse

impact which might occur as a consequence of the development of such ocean thermal energy conversion facilities or plantships;

(6) make applicable certain provisions of the Merchant Marine Act, 1936 (46 U.S.C. 1177 *et seq.*) [46 U.S.C.A. § 1101 *et seq.*] to assist in financing of ocean thermal energy conversion facilities and plantships;

(7) protect the interests of the United States in the location, construction, and operation of ocean thermal energy conversion facilities and plantships; and

(8) protect the rights and responsibilities of adjacent coastal States in ensuring that Federal actions are consistent with approved State coastal zone management programs and other applicable State and local laws.

(b) The Congress declares that nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.

(Pub.L. 96-320, § 2, Aug. 3, 1980, 94 Stat. 974.)

42 U.S.C.A. § 9124 *Civil Actions*

(a) Jurisdiction

Except as provided in subsection (b) of this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action for equitable relief on his own behalf in the United States District Court for the District of Columbia whenever such action constitutes a case or controversy—

(1) against any person who is alleged to be in violation of any provision of this chapter or any regulation or condition of a license issued pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.

In suits brought under this chapter, the district courts of the United States shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any provision of this chapter or any regulation or term or condition of a license issued pursuant to this chapter, or to order the Administrator to perform such act or duty, as the case may be.

(b) Notice

No civil action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to the Administrator and to any alleged violator; or

(B) if the Administrator or the Attorney General has commenced and is diligently prosecuting a civil or criminal action with respect to such matters in a court of the United States, but in any such action any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator.

Notice under this subsection shall be given in such a manner as the Administrator shall prescribe by regulation.

. . .

(Pub.L. 96-320, Title I, § 114, Aug. 3, 1980, 94 Stat. 990)

XVI. Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1301-1356 (West 1983 & Supp. 1989).

43 U.S.C.A. § 1349 *Citizen Suits, Jurisdiction and Judicial Review*

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter, or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation

constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

. . .

(Aug. 7, 1953, C. 345, § 23, added Sept. 18, 1978, Pub.L. 95-372, Title II, § 208, 92 Stat. 657, and amended Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(44), 98 Stat. 3360)

XVII. Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1989).

42 U.S.C.A. § 6902 *Objectives*

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by:

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment;

(5) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(6) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(7) promoting the demonstration, construction and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(8) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(Pub.L. 89-272, Title II, § 1003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2798)

42 U.S.C.A. § 6972 *Citizens Suits*

(a) In general

Except as provided in subsection (b) or (c) of this section any person may commence a civil action on his own behalf—

(1) (A) against any person (including (a) the United States and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2) (A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to

the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.A. § 9606];

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 *et seq*.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may

have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 *et seq.*].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of

the complaint on the Attorney General of the United States and with the Administrator.

. . .

(Pub.L. 89-272, Title II, § 7003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2826, and amended Pub.L. 95-609, § 7(q), Nov. 8, 1978, 92 Stat. 3083; Pub.L. 96-482, § 25, Oct. 21, 1980, 94 Stat. 2348, and Pub.L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268)

XVIII. Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j-10 (West 1982 & Supp. 1989).

42 U.S.C.A. § 300j-8 *Citizens Civil Action*

Persons subject to civil action; jurisdiction of enforcement proceedings

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any requirement prescribed by or under this subchapter, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter which is not discretionary with the Administrator.

No action may be brought under paragraph (1) against a public water system for a violation of a requirement prescribed by or under this subchapter which occurred within the 27-month period beginning on the first day of the month in which this subchapter is enacted. The United States district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the

parties, to enforce in an action brought under this subsection any requirement prescribed by or under this subchapter or to order the Administrator to perform an act or duty described in paragraph (2), as the case may be.

Conditions for commencement of civil action; notice

(b) No civil action may be commenced—

(1) under subsection (a)(1) of this section respecting violation of a requirement prescribed by or under this subchapter—

(A) prior to sixty days after the plaintiff has given notice of such violation (i) to the Administrator, (ii) to any alleged violator of such requirement and (iii) to the State in which the violation occurs, or

(B) if the Administrator, the Attorney General, or the State has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with such requirement, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

Notice required by this subsection shall be given in such manner as the Administrator shall prescribe by regulation. No person may commence a civil action under subsection (a) of this section to require a State to prescribe a schedule under section 300g-4 or 300g-5 of this title for a variance or exemption, unless such person shows to the satisfaction of the court that the State has in a substantial number of cases failed to prescribe such schedules.

. . .

(July 1, 1944, c. 373, Title XIV, § 1443, as added Dec. 16, 1974, Pub.L. 93-523, § 2(a), 88 Sat. 1690, and

amended Nov. 16, 1977, Pub.L. 95-190, § 8(c), 91 Stat. 1397; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(38), 98 Stat. 3360.)

XIX. Surface Mining Control and Reclamation Act, 33 U.S.C.A. §§ 1201-1328 (West 1986 & Supp. 1989).

30 U.S.C.A. § 1202 *Statement of Purpose*

It is the purpose of this chapter to—

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this chapter;

(h) promote the reclamation of mined areas left without adequate reclamation prior to August 3, 1977, and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent

or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter;

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals;

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

(Pub.L. 95-87, Title I, § 102, Aug. 3, 1977, 91 Stat. 448.)

30 U.S.C.A. § 1270 *Citizens Suits*

(a) Civil action to compel compliance with this chapter

Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter, or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

(b) Limitation on bringing of action

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator, or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this chapter, or any rule, regulation, order, or permit issued pursuant to this chapter, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(Pub.L. 95-87, Title I, [0015] 520, Aug. 3, 1977, 91 Stat. 447)

XX. Toxic Substance Control Act 15 U.S.C.A. §§ 2601-2671 (West 1982 & Supp. 1989).

15 U.S.C.A. § 2601 *Findings, Policy and Intent*

(a) Findings—The Congress finds that—

(1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;

(2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and

(3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures.

(b) Policy—It is the policy of the United States that—

(1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures;

(2) adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards; and

(3) authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.

(c) Intent of Congress—It is the intent of Congress that the Administrator shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.

(Pub.L. 94-469, § 2, Oct. 11, 1976, 90 Stat. 2003.)

15 U.S.C.A. § 2619 *Citizens Civil Actions*

(a) In general—Except as provided in subsection (b) of this section, any person may commence a civil action—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of this chapter or any rule promulgated under section 2603, 2604, or 2605 of this title or order issued under section 2604 of this title to restrain such violation, or

(2) against the Administrator to compel the Administrator to perform any act or duty under this chapter which is not discretionary.

Any civil action under paragraph (1) shall be brought in the United States district court for the district in which the alleged violation occurred or in which the defendant resides or in which the defendant's principal place of business is located. Any action brought under paragraph (2) shall be brought in the United States District Court for the District of Columbia or the United States district court for the judicial district in which the plaintiff is domiciled. The district courts of the United States shall have jurisdiction over suits brought under this section, without regard to the amount in controversy or the citizenship of the parties. In any civil action under the subsection process may be served on a defendant in any judicial district or which the defendant resides or may be found and subpoenas for witnesses may be served in any judicial district.

(b) Limitation—No civil action may be commenced

(1) under subsection (a)(1) of this section to restrain a violation of this chapter or rule or order under this chapter—

(A) before the expiration of 60 days after the plaintiff has given notice of such violation (i) to the Administrator, and (ii) to the person who is alleged to have committed such violation, or

(B) if the Administrator has commenced and is diligently prosecuting a proceeding for the issuance of an order under section 2635(a)(2) of this title to require compliance with this chapter or with such rule or order or if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with this chapter or with such rule or order, but if such proceeding or civil action is commenced after the giving of notice, any person giving such notice may intervene as a matter of right in such proceeding or action; or

(2) Under subsection (a)(2) of this section before the expiration of 60 days after the plaintiff has given notice to the Administrator or the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 2606 of this title, before the expiration of ten days after such notification.

Notice under this subsection shall be given in such manner as the Administrator shall prescribe by rule.

. . .

(Pub.L. 94-469, Title I, § 20, Oct. 11, 1976, 90 Stat. 2041, redesignated and amended Pub.L. 99-519, § 3(b)(3),(c)(1), Oct. 22, 1986, 100 Stat. 2989)

(8)

No. 88-42

In the Supreme Court of the United States

OCTOBER TERM, 1988

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioners' action to enforce standards created under the Resource Conservation and Recovery Act of 1976 must be dismissed because petitioners did not give the Administrator of the Environmental Protection Agency notice of this action 60 days before it was filed, as required by 42 U.S.C. 6972(b)(1).

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INTEREST OF THE UNITED STATES

This case arises under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901-6987 (1982 & Supp. IV 1986), which was enacted to regulate the disposal of solid wastes and to promote the protection of health and the environment. See 42 U.S.C. 6901-6902 (1982 & Supp. IV 1986). Petitioners filed this action under Section 7002(a)(1)(A) of RCRA, 42 U.S.C. 6972(a)(1)(A) (Supp. IV 1986), which allows private persons to bring actions to enforce the standards and requirements of the Act. Congress has authorized such private actions to supplement the federal government's enforcement of the statute.[1] See *Gwaltney of Smithfield* v. *Chesapeake Bay*

[1] RCRA, for example, authorizes the Administrator of the Environmental Protection Agency to issue administrative orders assessing civil penalties and requiring compliance with the Act. The United States may commence civil actions for injunctive relief and civil penalties of up to $25,000 per day. 42 U.S.C. 6928(a) (1982 & Supp. IV 1986). And criminal sanctions may be imposed for certain violations. 42 U.S.C. 6928(d) (1982 & Supp. IV 1986).

Foundation, Inc., 108 S. Ct. 376, 383 (1987). RCRA's citizen-suit provision states that no such action "may be commenced * * * prior to sixty days after the plaintiff has given notice of the violation to * * * the Administrator [of the Environmental Protection Agency]; the State in which the alleged violation occurs; and to any alleged violator * * *." 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). Similar notice requirements are found in the citizen-suit provisions of at least 18 other federal statutes.[2] The United States' interest in this case is to maintain the balance created by Congress—as defined by the notice requirement—between government enforcement and private court actions.

STATEMENT

1. Petitioners own a dairy farm located next to the Tillamook County landfill in Tillamook County, Oregon (Pet. App. 2a). On April 20, 1981, petitioners mailed formal notice to the County of their intent to bring an action to compel the County's compliance with landfill requirements of RCRA (Pet. 4). Petitioners, however, did not notify the Administrator of the Environmental Protection Agency, nor the Oregon Department of Environmental Quality (DEQ), of their intent to sue (Pet. App. 2a).

On April 9, 1982, petitioners filed this action against the County under the citizen-suit provision of RCRA, 42 U.S.C. 6972(a)(1). Petitioners alleged that leachate discharged from the landfill caused bacterial and chemical pollution of the surface and ground water within their property (Pet. App. 2a). Petitioners also set forth state-law claims for inverse condemnation, trespass, and nuisance (*ibid.*).

[2] The relevant portions of the citizen-suit provisions of those statutes are reprinted in Appendix B to the amicus curiae brief filed by five environmental groups in support of petitioners.

On March 1, 1983, Tillamook County moved for summary judgment on the ground that petitioners had failed to comply with the notice requirement of Section 7002(b)(1)(A). On March 2, 1983, petitioners sent a copy of their original notice of intent to sue to the Administrator of EPA and the DEQ. Petitioners informed those governmental agencies that they intended to refile their action if the court dismissed their case (Pet. App. 19a).

2. On April 22, 1983, the district court denied the County's motion for summary judgment. It ruled that petitioners had cured any defect in notice by notifying the Administrator and the DEQ on March 2, 1983 (Pet. App. 19a). The court stated that the purpose of the notice provision in Section 7002(b)(1)(A) was to give the administrative agencies the chance to bring their own enforcement actions (Pet. App. 19a). Here, the court observed, EPA and the DEQ had expressed no interest in bringing an action. The district court concluded, therefore, that "[t]o grant defendant's motion based on the notice provision would be a waste of judicial resources" (*ibid.*).

Following a trial in July 1985, the district court held that the County's landfill violated RCRA requirements. The court ordered the County to remedy the violation within two years (Pet. App. 2a). A jury, however, found in favor of the County on all three state-law claims (*ibid.*). The district court later denied petitioners' request for an award of attorneys' fees and expert fees.

3. On November 3, 1987, a divided panel of the court of appeals vacated the judgment and remanded the case to the district court to be dismissed. The court ruled that the 60-day notice requirement in Section 7002(b)(1)(A) is a jurisdictional prerequisite to bringing a private suit under RCRA (Pet. App. 6a). The court explicitly agreed with the First Circuit in *Garcia* v. *Cecos International, Inc.*, 761 F.2d 76, 79 (1985), that "the plain language of [§ 7002(b)

(1)(A) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language' " (Pet. App. 4a). The court of appeals found the plain language to be supported by the provision's purpose "of encouraging non-judicial resolution of environmental conflicts" (*id.* at 4a-5a).[3]

SUMMARY OF ARGUMENT

1. Section 7002(b)(1)(A) of RCRA states that "[n]o action may be commenced under" the citizen-suit provision of RCRA until "60 days after the plaintiff has given notice" to EPA, the State, and the alleged violator. Under the Federal Rules of Civil Procedure, an action is commenced by filing a complaint with the court. Hence, the meaning of Section 7002(b)(1)(A) is clear: a private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he gives the required notice. Here, petitioners did not give the required prior notice; thus, the court of appeals correctly held that this action must be dismissed for lack of jurisdiction.

Petitioners argue that a private action may be commenced without notice so long as the court does not act until 60 days after the government has been notified. That suggested procedure is inconsistent with the plain terms of the statute. An action that is stayed pending proper notice was nevertheless commenced prior to the notice period and is thus prohibited by Section 7002(b)(1).

2. The legislative history of Section 7002(b) confirms that Congress intended for prior notice to be a prerequisite

[3] The court of appeals amended its opinion on April 7, 1988, to make it clear that, because the district court lacked jurisdiction over petitioners' federal-law claim, it lacked pendent jurisdiction over the state-law claims as well (Pet. App. 14a-15a).

to a plaintiff's commencing a suit. There is much evidence that Congress was well aware of the mandatory nature of prior notice. And there is no hint that Congress wished to give a court the discretion to disregard that clear requirement in a particular case.

The 60-day notice period gives enforcement agencies an opportunity to act on the alleged violation and it gives the alleged violator a chance to bring itself into compliance with the law. Those dual purposes could be frustrated by petitioners' suggestion that a plaintiff may file a complaint so long as the district court takes no action until the government has been on notice for 60 days. Once a suit is filed, positions become hardened and cooperation is less likely. Accordingly, this Court should follow the plain terms of Section 7002(b) and hold that petitioners' action is barred because it was commenced without prior notice to the government.

ARGUMENT

THIS ACTION MUST BE DISMISSED BECAUSE PETITIONERS DID NOT GIVE THE GOVERNMENT PRIOR NOTICE AS REQUIRED BY SECTION 7002(b)(1)(A)

A. The Court of Appeals' Decision Follows From The Plain Language of the Statute

1. It is well settled that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 108 S. Ct. at 381; *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 108.

Here, Section 7002(b)(1)(A) of RCRA states that "[n]o action may be commenced under" Section 7002(a)(1)(A) until "60 days after the plaintiff has given notice" to EPA, the State, and the alleged violator.[4] Rule 3 of the Federal Rules of Civil Procedure, in turn, defines when an action is "commenced"; it provides that "[a] civil action is commenced by filing a complaint with the court." Section 7002(b)(1)(A) of RCRA is thus "uncomplicated." *North Dakota* v. *United States*, 460 U.S. at 312. It creates a clear and easy-to-follow rule. A private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he gives the required notice. See *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 79-82 (RCRA's notice requirement is "unambiguous"); *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 316-317 (6th Cir. 1985) (same); see also *City of Highland Park* v. *Train*, 519 F.2d 681, 691 (7th Cir. 1975) ("language chosen by Congress makes it clear that the Administrator is to be given notice in addition to that required by Rule 12(a), Fed. R. Civ. P., which allows him sixty days to answer or move against a complaint by which an action is commenced"), cert. denied, 424 U.S. 927 (1976).

Congress allows certain private actions to be commenced under federal environmental laws without prior notice to the government. For example, a private action under RCRA may be brought "immediately" to remedy alleged violations concerning the treatment, storage, or disposal of hazardous wastes. See 42 U.S.C. 6972(b)(1)(A) (1982 & Supp. IV 1986).[5] Similarly, Congress allows pri-

[4] This case does not present a question concerning the adequacy of such notice. All the parties agree that the Administrator of EPA was not notified until after this case was commenced. See Pet. App. 19a.

[5] RCRA defines "hazardous waste" as "solid waste" which may "cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," or which may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. 6903(5). Petitioners have made no allegations concerning hazardous waste in this case.

vate actions under the Federal Water Pollution Control Act (Clean Water Act) to be brought immediately in cases involving violations of "toxic pollutant * * * effluent limitation[s]." See 33 U.S.C. 1365(b) and 1317(a).[6] Thus Congress has carefully chosen which type of actions may—and which type may not—be commenced without prior notice to the government. This demonstrates that "[t]he notice requirement is not a technical wrinkle or superfluous formality." *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 79.

Petitioners argue (Br. 26-30, 38-39) that a private action under Section 7002(a)(1) may be commenced without prior notice so long as the court does not act until 60 days after the government has been notified. Although one court of appeals adopted that approach (erroneously in our view) in applying a similar provision in the Clean Water Act,[7]

[6] There are other examples. The Clean Air Amendments of 1970, 42 U.S.C. 7604(b), authorizes immediate citizen suits involving stationary-source emission standards and certain compliance orders. The Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2)(C), allows immediate private actions relating to the listing of threatened and endangered species where there is "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." The Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(3), authorizes an immediate suit where the alleged violation "constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff."

[7] See *Pymatuning Water Shed Citizens for a Hygienic Environment* v. *Eaton*, 644 F.2d 995, 996 (3d Cir. 1981); accord *Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir. 1985). Contrary to the briefs of petitioners and amici (Pet. Br. 24; Amici Br. 11), the Second, Eighth, and District of Columbia Circuits have not

that suggested procedure is flatly inconsistent with Section 7002(b)(1). An action that is stayed pending proper notification was nevertheless "commenced" "prior to 60 days after the plaintiff [gave] notice of the violation" to the required persons. § 7002(b)(1), 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). And such an action, by the plain terms of Section 7002(b)(1), is "prohibited." 42 U.S.C. 6972(b)(1) (1982 & Supp. IV 1986). The only remedy that is consistent with the language of the statute is to bring the improperly commenced action to an end—*i.e.*, to dismiss it for lack of jurisdiction. An order of dismissal cleans the slate and the plaintiff may commence a new action if and when he complies with the notice provision. "To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.' " Pet. App. 4a, quoting *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 78. Accord *Save the Yaak Committee* v. *Block*, 840 F.2d 714, 721 (9th Cir. 1988).

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adopted the so-called "pragmatic" approach followed by the Third Circuit. The courts in *NRDC* v. *Callaway*, 524 F.2d 79, 83 (2d Cir. 1975), and *NRDC* v. *Train*, 510 F.2d 692, 703 (D.C. Cir. 1974), permitted those suits to proceed in the absence of prior notice because the plaintiffs stated claims under the Administrative Procedure Act, which does not require prior notice. In *Friends of the Earth* v. *Carey*, 535 F.2d 165, 175 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977), the Second Circuit addressed only whether notice to one agency constituted notice to a sister agency, not whether the 60-day notice requirement must be met. In *Hempstead County & Nevada County Project* v. *EPA*, 700 F.2d 459, 463 (1983), the Eighth Circuit transferred an action brought under RCRA to the district court after it held that it lacked jurisdiction over the plaintiffs' claim. The court stated that the notice provision in Section 7002 had been satisfied (700 F.2d at 463) so that the plaintiffs' action could properly be commenced in the district court. Finally, the Eighth Circuit in *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303 (1976), without analysis, permitted that action to proceed without notice because of a "unique evidentiary situation" but stated that its decision could "not be cited as authority for future disregard of the notice requirement."

2. Petitioners state (Br. 13) that Section 7002(b)(1) "does not speak in jurisdictional terms or refer to the jurisdiction of the court." That is not correct if petitioners are suggesting that the district court had jurisdicion to adjudicate the claim in this case. Section 7002(b)(1) defines in precise terms when a private person may commence an action under RCRA—*i.e.*, only after he has given the proper notice and waited 60 days. That language may not be disregarded at the discretion of a district court simply because Congress did not use the word "jurisdiction" in the Section. See, *e.g.*, *Teague* v. *Regional Comm'r of Customs, Region II*, 394 U.S. 977 (1969) (time limits in 28 U.S.C. 2101 for taking cases to the Supreme Court are jurisdictional even though the statute does not use the word "jurisdiction").

Indeed, Congress's use of the word "jurisdiction" in Section 7002(b)(1) would have been inconsistent with the structure of the statute. Congress used the word "jurisdiction" in Section 7002(a) to designate the courts that are competent to hear citizen claims under RCRA. That Section provides that an action "shall be brought in the district court for the district in which the alleged violation occurred [and] the district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 42 U.S.C. 6972(a) (1982 & Supp. IV 1986). There is no doubt that the district court in this case was competent to hear petitioners' claim—*i.e.*, that it would have had jurisdiction over a valid cause of action commenced after proper notice. The question is whether the district court was required to dismiss petitioners' action when the County raised the issue of lack of notice. Section 7002(b)(1) answers that question by stating that an action is "prohibited" if it is "commenced" "prior to sixty days after the plaintiff has given notice of the violation" to the Administrator of EPA. Accordingly, the district court was without jurisdiction to proceed further when it learned that

petitioners failed to give the required notice before they commenced this action.

Petitioners' reliance (Br. 22, 34) on *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is also misplaced. In that case, this Court considered Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), which requires that a claimant file with the Equal Opportunity Employment Commission (EEOC) a claim within 180 days after the alleged unlawful employment practice occurred. The Court ruled that the filing deadline is in the nature of a statute of limitations and is subject to "waiver as well as tolling when equity so requires." 455 U.S. at 398. Contrary to petitioners' suggestion, however, this Court did not hold that the filing requirement in Section 706(e) may be disregarded at the discretion of a court. Indeed, the Court recently affirmed a judgment dismissing a Title VII action where the plaintiffs failed to make a timely filing with the EEOC. *Lorance* v. *AT&T Technologies, Inc.*, No. 87-1428 (June 12, 1989). Thus, *Zipes* provides no authority for the proposition that a court may ignore the plain meaning of Section 7002(b)(1)(A) of RCRA.

B. The Decision Below Is Consistent With The History And Purpose Of The Notice Requirement

As the language of the statute is clear, there is no need to repair to secondary materials for evidence of Congress's intent. See, *e.g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989); *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Nevertheless, to the extent that such materials may be relevant when the statute itself speaks with such clarity, see *Burlington Northern Railroad*, 481 U.S. at 461-464, the legislative history demonstrates that the provision at issue is no drafting error, that "the result it apparently decrees is [not] difficult to fathom or * * * inconsistent with Congress' intention" (*Public Citizen* v. *Department of Justice*, No. 88-429 (June 21, 1989), slip op. 13), and that the statute, indeed, means what it says.

Until 1970, federal environmental statutes were enforceable only by the government. See, *e.g.*, Clean Air Act of 1963, Pub. L. No. 88-206, § 5, 77 Stat. 396. Congress first gave private parties the right to bring enforcement actions in Section 304(a) of the Clean Air Amendments of 1970, which allowed private suits to enforce emission standards established under that Act. See 42 U.S.C. 7604(a). The Clean Air Act's notice requirement has been the model for the citizen-suit notice provisions in RCRA and other statutes. See *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 81. Its history is therefore helpful in understanding the intent of Congress in this case.

The legislative history of Section 304(a) confirms that Congress intended for notice to be a prerequisite to a plaintiff's commencing a suit. The Senate Committee Report explaining Section 304(a) stated that the "Committee has provided a period of time after notice *before a citizen may file an action* * * * [to] give the administrative enforcement office an opportunity to act on the alleged violation." S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970) (emphasis added). The Senate Report continued: "[T]o further encourage and provide for agency enforcement, the Committee has added a requirement that *prior to filing* a petition with the court, a citizen or group of citizens would first have to serve notice of intent *to file such action* * * *." *Ibid.* (emphasis added).[8]

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[8] The Senate Committee on Public Works initially drafted the Clean Air Act's citizen-suit provision, which required a 30-day notice period. The companion bill that passed the House did not authorize citizen suits. The conference committee adopted the Senate version, but extended the notice period to 60 days. See Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 205-206 (Comm. Print 1974). The full Congress then adopted the conference provision and required, in language identical to Section 7002(b)(1)(A) of RCRA, that "[n]o action may be commenced * * * prior to 60 days after the plaintiff has

Senator Muskie, the sponsor of the citizen-suit provision, stated on the floor that "before any citizen *can bring an action,* he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind." 116 Cong. Rec. 33,103 (1970) (emphasis added), *reprinted in* Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970,* at 353 (Comm. Print 1974). Likewise, the conference report stated that "*[p]rior to commencing any action in the district courts,* the plaintiff must have provided the violator, the Administrator and the State with sixty days notice." *Id.* at 206 (emphasis added). Accordingly, the intent of the Congress that passed Section 304(a) of the Clean Air Amendments of 1970 could not have been clearer: a plaintiff must provide the required notice before he files his court action.

The legislative history of RCRA's identical notice provision displays the same unambiguous intent. The House Report accompanying Section 7002(b) when it was adopted in 1976 stated that the notice requirement "prohibits any person *from commencing any action* under this section unless * * * 60 days have elapsed after the plaintiff has given notice of the violation * * *." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 69 (1976) (emphasis added). Thus, Congress plainly intended that notice be given 60 days prior to filing a complaint. There is no hint that Congress wished to allow a court to disregard that clear requirement whenever a court believes, as the district court did here, that to insist on prior notice "would be a waste of judicial resources" (Pet. App. 19a).

Petitioners correctly note (Br. 16-17) that Congress has passed citizen-suit provisions to authorize and encourage

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given notice of the violation" to EPA, the relevant State, and the violator. 42 U.S.C. 7604(b)(1)(A) (1982 & Supp. IV 1986).

private participation in the enforcement of federal environmental statutes. See S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (report of Public Works Committee on the Clean Air Amendments of 1970). Private citizens can perform a "public service" by uncovering violations and by "motivat[ing] governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." *Id.* at 37, 38. A citizen suit, however, "is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation,* 108 S. Ct. at 383. Congress intended that " 'the great volume of enforcement actions [ ] be brought by [the government]', and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.' " *Ibid.,* quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64 (1971) (discussing citizen-suit provision of Clean Water Act). See also § 7002(b)(2) of RCRA, 42 U.S.C. 6972(b)(2) (1982 & Supp. IV 1986) (prohibiting private enforcement actions if the government is already prosecuting such an action).

Accordingly, the 60-day notice period has two recognized purposes. First, it gives enforcement agencies "an opportunity to act on the alleged violation." S. Rep. No. 1196, *supra,* at 37. Second, as this Court observed in *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc., supra,* prior notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 108 S. Ct. at 382-383. Both of those purposes would be frustrated by petitioners' suggested rule—*i.e.,* a plaintiff may file a complaint so long as the district court takes no action until the government has been on notice for 60 days. The court of appeals below aptly recognized that "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that co-

operation and compromise [are] less likely" (Pet. App. 5a). See also *Hearings on S. 3229, S. 3466 and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 91st Cong., 2d Sess. 1570 (1970). Moreover, while a suit is pending a defendant is very unlikely to admit liability and agree to remedy a violation. To do so would be to subject the defendant to the possibility of attorney's fees and civil fines. See 42 U.S.C. 6928. Thus, "far from being a mere formality, prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit." *Walls* v. *Waste Resource Corp.*, 761 F.2d at 317.

Petitioners' amici contend that the court of appeals' decision will "hinder" and "create a rigid barrier to" citizen suits (Amicus Br. 12, 9). That contention is unpersuasive. Section 7002(b)(1) sets forth a simple rule; it requires prior notice to three specified persons. If the plaintiff fails to give prior notice, his action must be dismissed until he complies with the notice requirement. After proper notice is given and 60 days elapse, the plaintiff may file a new action. The clarity and predictability of applying the statute in accordance with its plain terms stand in sharp contrast to amici's litigation-generating proposal for case-by-case determinations of whether the plaintiffs have provided "sufficient notice" to allow enforcement agencies "adequate opportunity" to investigate and to act (Amicus Br. 19). For an overburdened judicial system, amici's approach, apart from being inconsistent with the statute, has little to commend it.

Finally, petitioners' amici argue (Amicus Br. 3) that the court of appeals' decision will prevent federal courts "from providing essential temporary injunctive relief in cases when notice would otherwise be waived or excused." Amici's argument, of course, assumes that public agencies directed to enforce the environmental statutes will fail to

meet their responsibilities during the notice period. There is no basis for that assumption. In any event, the argument is misdirected; it is the responsibility of Congress to amend the relevant statutes if it believes that the environment faces irreversible harm during the notice period. Congress is richly experienced in drafting statutes that authorize citizen suits without prior notice. See pp. 6-7, *supra*. Congress has decided that petitioners' type of action is not such a suit. That determination warrants the judiciary's respect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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